Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 and has determined that, to the extent allowed by law, this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and 30 CFR 730.11, 732.15 and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR parts 730, 731 and 732 have been met.

National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C).

Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3507 *et seq.*

Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal which is the subject of this rule is based upon corresponding Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the corresponding Federal regulations.

List of Subjects in 30 CFR Part 938

Intergovernmental relations, Surface mining, Underground mining.

Dated: July 13, 1994.

Ronald C. Recker,

Acting Assistant Director, Eastern Support Center.

For the reasons set forth in the preamble, Title 30, Chapter VII, Subchapter T of the Code of Federal Regulations is amended as set forth below:

PART 938—PENNSYLVANIA

1. The authority citation for Part 938 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

2. Section 938.15 is amended by adding paragraph (bb) to read as follows:

§ 938.15 Approval of regulatory program amendments.

* * * * *

(bb) The following amendment to the Pennsylvania regulatory program, as submitted to OSM on May 11, 1993, and clarified by letter dated February 17, 1994, is approved, except as noted herein, effective July 20, 1994. Revisions to Title 25, Pennsylvania Code Sections 86.142, 86.159, and 86.166 concerning self-bonding provisions, except to the extent that Section 86.159(l)(2) does not contain all the requirements for the execution of indemnity agreements.

3. In § 938.16, paragraphs (i), (j), and (k) are removed and reserved and a new paragraph (nnn) is added to read as follows:

§ 938.16 Required regulatory program amendments.

* * * * *

(nnn) By September 19, 1994, Pennsylvania shall submit either a proposed amendment or a description of an amendment to be proposed, together with a timetable for adoption, to revise section 86.159(l)(2) to require two officer signatures for each corporate indemnitor, an affidavit from the corporation(s) certifying that entering into the indemnity agreement is valid under all applicable Federal and State laws, and documents that evidence the authority of the signatories to bind the corporation and an authorization by the parent corporation to enter into the indemnity agreement.

[FR Doc. 94-17633 Filed 7-19-94; 8:45 am]

BILLING CODE 4310-05-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[AMS-FRL-5007-9]

Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline

AGENCY: Environmental Protection Agency.

ACTION: Direct final rule.

SUMMARY: The Clean Air Act, as amended in 1990 (CAA or the Act), mandated that the Environmental Protection Agency (EPA or the Agency) promulgate regulations requiring that gasoline sold in certain areas be reformulated to reduce vehicle emissions of toxic and ozone-forming compounds and that gasoline sold outside these areas would not be more polluting than it was in 1990. On February 16, 1994, EPA published the final rule establishing performance standards and compliance provisions for conventional and reformulated gasoline (RFG). This direct final rule (DFRM) makes minor corrections, clarifications, and revisions to various provisions in the final reformulated gasoline rule.

This action addresses the following issues: Work-In-Progress (WIP) baseline adjustments; JP-4 baseline adjustments; summer/winter season definition for baseline determination; complex model valid range extension for conventional gasoline baselines; valid range limits for aromatics, oxygen, benzene, and RVP; clarifications to the VOC and NO_X extrapolations in the complex model; clarifications of seasonal condition inconsistencies; and enforcement corrections/clarifications associated with the reformulated gasoline and anti-dumping regulations, as well as several technical clarifications and typographical corrections.

EFFECTIVE DATES: This rule will be effective September 19, 1994 unless notice is received by August 19, 1994 that adverse or critical comments will be submitted or that an opportunity to submit such comments at a public hearing is requested. If such comments or a request for a public hearing are received by the Agency, then EPA will publish a subsequent Federal Register notice withdrawing from this action only those items which are specifically listed in those comments or in the request for a public hearing. See **SUPPLEMENTARY INFORMATION** for further discussion on submission of public comment.

ADDRESSES: Interested parties may submit written comments (in duplicate, if possible) to Public Docket No. A–94–30, at Air Docket Section, U.S. Environmental Protection Agency, Waterside Mall, Room M–1500, 401 M Street SW., Washington, DC 20460. The Agency requests that commenters also send a copy of any comments to David Korotney at the address listed in the **FOR FURTHER INFORMATION CONTACT** section.

Materials relevant to the reformulated gasoline final rule and this direct final rule are contained in Public Dockets A–91–02 and A–92–12, located at room M–1500, Waterside Mall (ground floor), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket may be inspected from 8 a.m. until 12 noon and from 1:30 p.m. until 3 p.m. Monday through Friday. A reasonable fee may be charged by EPA for copying docket materials.

FOR FURTHER INFORMATION CONTACT:

David Korotney, U.S. EPA (RDSD–12), Regulation Development and Support Division, 2565 Plymouth Road, Ann Arbor, MI 48105, Telephone: (313) 668–4507.

To Request Copies of this Action Contact: Delores Frank, U.S. EPA (RDSD–12), Regulation Development and Support Division, 2565 Plymouth Road, Ann Arbor, MI 48105, Telephone: (313) 668–4295.

SUPPLEMENTARY INFORMATION:

Public Comments

For parties that submit adverse or critical comments, notify EPA of intentions to submit adverse comments, or request a public hearing, the Agency requests that commenters identify each of the items at issue by the specific preamble section numbers that discuss those items. For instance, adverse comments on the change to the oxygen valid range limits should include a reference to Section (Item Number) II.A.1 of the preamble. Adverse comments on any of the insubstantial errors in Section I of the preamble should include a reference to the identification code associated with each change in that section. For instance, adverse comments on the paragraph reference change in § 80.41(h)(2)(iii) should include a reference to Item Number I–A. The EPA will withdraw from this direct final action only those specific provision(s) so identified. All other provisions included in today's notice will become effective on September 19, 1994.

EPA believes that the use of a direct final rule is appropriate because the changes made are generally minor in nature and all are expected to be non-controversial. The DFRM will allow the Agency to finalize such changes in a timely manner. For instance, many of the changes contained herein clarify issues relevant to the development and auditing of individual baselines which, in general, must be submitted by either June 1, 1994 or September 1, 1994. Likewise, the reformulated gasoline program will commence on December 1, 1994. The clarifications and changes contained herein will promote successful implementation of this program.

A copy of this action is available on the OAQPS Technology Transfer Network Bulletin Board System (TTNBBS). The TTNBBS can be accessed with a dial-in phone line and a high-speed modem (PH# 919–541–5742). The parity of your modem should be set to none, the data bits to 8, and the stop bits to 1. Either a 1200, 2400, or 9600 baud modem should be used. When first signing on, the user will be required to answer some basic informational questions for registration purposes. After completing the registration process, proceed through the following series of menus:

(M) OMS
(K) Rulemaking and Reporting
(3) Fuels
(9) Reformulated gasoline

A list of ZIP files will be shown, all of which are related to the reformulated gasoline rulemaking process. Today's action will be in the form of a ZIP file and can be identified by the following title: RFG–DFRM.ZIP. To download this file, type the following instructions and transfer according to the appropriate software on your computer:

<D>ownload, <P>rotocol, <E>xamine, <N>ew, <L>ist, or <H>elp Selection or <CR> to exit: D *filename.zip*

You will be given a list of transfer protocols from which you must choose one that matches with the terminal software on your own computer. The software should then be opened and directed to receive the file using the same protocol. Programs and instructions for de-archiving compressed files can be found via <S>ystems Utilities from the top menu, under <A>rchivers/de-archivers. Please note that due to differences between the software used to develop the document and the software into which the document may be downloaded, changes in format, page length, etc. may occur.

The remainder of this preamble is organized into the following sections:

I. Insubstantial Errors

The final rulemaking for the regulation of reformulated and conventional gasoline contained a number of errors, ambiguities, and misrepresentations of Agency intent which are being addressed by this direct final rule. Of these errors, many are minor in both form and effect. The minor errors do not require detailed discussions since they all have at most a negligible effect on compliance with the regulations, and require only simple corrections. Such minor errors took the form of typographical errors, grammatical errors, inadvertent omissions, and inadvertent insertions. The table below lists all the insubstantial errors that are being corrected in this direct final rule. Other errors are more substantial. The more substantial errors and the associated corrections have been discussed on an item-by-item basis in the following sections.

Identification code	Regulation reference	Correction
A	80.41(h)(2)(iii)	Correct the paragraph reference from 80.101(g) to 80.101(h).
B	80.41(j)(2)	Correct the paragraph reference from (j)(1)(i) to (j)(1).
C	80.41(m)(1)	A missing word "of" is inserted into the text.
D	80.42(c)(1)	In the table, change the valid range limits for "Oxygenate" in volume percent to valid range limits for "Oxygen" in weight percent to match the values already present.
E	80.42(a)	Correct the definition of exhaust and nonexhaust VOC from nonmethane hydrocarbons to nonmethane, nonethane hydrocarbons. All calculations and equations are correctly based on nonmethane, nonethane hydrocarbons.

Identification code	Regulation reference	Correction
F	80.42(b)(1)(ii), 80.42(b)(2)(ii), and 8042(b)(3)(ii).	Add a concluding sentence which clarifies that the use of methanol and other non-alcohol, non-ether oxygenates in reformulated gasoline is limited to vehicle testing under the Complex Model.
G	80.45(b)(3)	Correct the inadvertent omission of the first decimal place in the baseline values for exhaust VOC and NO_X in Table 3.
H	80.45(c)(1)(iv)(A)	The footnotes to Table 6 are clarified to indicate that the higher E300 limit can be no higher than 94 percent as described in paragraphs 80.45 (c)(1)(iv)(C)(*6*) and 80.45(c)(1)(iv)(D)(*6*).
I	80.45(c)(1)(iv)(B)	Change the word "and" to "and/or".
J	80.45(c)(1)(iv)(C)(11)	The paragraph references are corrected from (c)(1)(iv)(C)(*8*) and (*9*)" to "(c)(1)(iv)(C)(*9*) and (*10*)."
K	80.45(c)(1)(iv)(C)(12)	Correct the second "E300" to "ΔE300".
L	80.45(c)(1)(iv)(C)(14)	The paragraph references are corrected from "(c)(1)(iv)(C)(*11*) and (*12*)" to "(c)(1)(iv)(C)(*13*)."
M	80.45(c)(1)(iv)(D)(11)	The paragraph references are corrected from "(c)(1)(iv)(D)(*8*) and (*9*)" to "(c)(1)(iv)(D)(*9*) and (*10*)."
N	80.45(c)(1)(iv)(D)(12)	Correct "E30′ 0" to "E300".
O	80.45(c)(1)(iv)(D)(14)	The paragraph references are corrected from "(c)(1)(iv)(D)(*11*) and (*12*)" to "(c)(1)(iv)(D)(*12*) and (*13*)."
P	80.45(c)(8)(ii)	An extraneous word "for" at the end of the paragraph is removed.
Q	80.45(d)(1)(iv)(B)	Change the word "and" to "and/or".
R	80.45(e)(1)(ii)	Correct the toxic emissions baseline values in the equations which were rounded incorrectly to mimic the correct values in Table 5 of 80.45(b)(3): In Phase I, "TOXICS2%=[100%×(TOXICS2–47.58mg/mi)]/(47.58 mg/mi)" In Phase II, "TOXICS1%=[100%×(TOXICS1–86.34mg/mi)]/(86.34 mg/mi)"
S	80.45(e)(4)(iii)	A missing word "an" is inserted into the last sentence.
T	80.45(e)(5)(iv) & 80.45(e)(6)(iv)	Add a concluding sentence which clarifies that the use of methanol and other non-alcohol, non-ether oxygenates in the Complex Model is limited to augmentation through vehicle testing.
U	80.45(e)(9) & 80.45(e)(10)	Correct the variable names in the equations to mimic the variable names in the definition list: "HSVOC1" is corrected to "VOCHS1", "DIVOC1" is corrected to "VOCD11", "RLVOC1" is corrected to "VOCRL1", "RFVOC1" is corrected to "VOCRF1", "HSVOC2" is corrected to "VOCHS2", "DIVOC2" is corrected to "VOCDI2", "RLVOC2" is corrected to "VOCRL2", "RFVOC2" is corrected to "VOCRF2".
V	80.45(f)(1)	The paragraph references are corrected from "(a), (c), and (d)" to "(c), (d), and (e)".
W	80.45(f)(1) (i) & (ii)	The units for E200 and E300 are corrected from "volume percent" to "percent evaporated".
X	80.48(c)(1)	Correct the paragraph reference from "(c)(1)(iv) of this section" to "(c)(1)(iv) of this section and 80.49(d)".
Y	80.48(c)(1)(v)	Revise last sentence to clarify that the model must be re-estimated after dropping the B_i term.
Z	80.48(c)(2)(iii)	A concluding sentence is added indicating that the centered form of the Complex Model will be made available upon request.
AA	80.48(g)	Correct "the augmentation petition" to "other augmentation petitions".
AB	80.49(a)(5)(i)	The "Candidate parameter" entry is deleted from the table.
AC	80.49(b)(3)(iii)	The paragraph reference is corrected from "(b)(2)(ii) and (b)(3)" to "(b)(2)(ii)".
AD	80.59(a)	Revise last sentence to clarify that closed-loop systems and adaptive learning components are minimum requirements.
AE	80.65(d)(3)	A cross-reference to the blendstock accounting requirement in 80.102(e) is corrected.
AF	80.66(g)(1) and (g)(2)(ii)	Cross-references to 80.45, pertaining to the calculation of per-gallon values for VOC, NO_X, and toxics emissions performance reduction, are corrected.
AG	80.68(c)(8)(ii)(A) and (c)(9)(ii)(A)	Cross-references to the complex model in 80.45 are corrected.
AH	80.68(c)(9)(ii)(B)	A cross-reference to the annual toxics emissions weighting formula in 80.68(c)(9)(i)(B) is corrected.
AI	80.68(c)(10(i)	A cross-reference to the NO_X emissions reduction percentage in 80.45 is corrected.
AJ	80.69(a)(7)(ii)	A cross-reference to the applicable correlation ranges in 80.65(e)(2)(i) is corrected.
AK	80.69(b)(3)	A cross-reference to the oxygen averaging requirements in 80.67(f) is corrected.
AL	80.70(j)(11)	The spelling of Allegheny County, Pennsylvania, is corrected.
AM	80.75(j)	A cross-reference to the survey provisions in 80.41(q)(2) is corrected.
AN	80.81(h)	A cross-reference to the sampling and analysis methodology in 80.46 is corrected.
AO	80.90(b)(1)	In the equation, correct the variable "BX" to "BZ".
AP	80.90(e)(2)	The paragraph reference is corrected from "(e)(2)" to "(e)(1)".
AQ	80.91(e)(2)(iv)	In the equation only, the variable "N_{js}" is corrected to "n_{js}", the variable "n_s" is corrected to "N_s", the variable "p_j" is corrected to "p_{js}".
AR	80.91(e)(4)(i)(A)	Correct the equation to include division by 100 as follows: UV=[AV/(100-OV)] – 100

Identification code	Regulation reference	Correction
AS	80.91(e)(4)(i)(B)	Correct the equation to include division by 100 in two places: $UR=[BR-\{\Sigma(OV_i \times OR_i)\}/100]/[\{100-\Sigma OV_i\}/100]$
AT	80.91(e)(4)(ii)(A)	Correct the equation to include division by 100 as follows: $AV=UV(100-OV)/100$
AU	80.91(e)(4)(ii)(A)	Correct the definition of UV from "nonoxygenated parameter value" to "non-oxygenated parameter value".
AV	80.91(e)(4)(ii)(B)	Correct the equation to include division by 100 as follows: $BR=\{UR \times [100-\Sigma(OV_i)]+\Sigma(OV_i \times OR_i)\}/100$
AW	80.93(a)(3)(ii)	Re-word the first sentence to read "Petitions, 'showings' and other associated proof may be submitted to EPA prior to submittal of the individual baseline (per paragraphs (a)(1) and (a)(2) of this section)".
AX	80.93(c)(9)	A cross-reference to 80.93 (c)(8) is clarified.
AY	80.101(e)(3) & (f)(4)	References to California gasoline are clarified.
AZ	80.102(b)(1)	An extraneous word is deleted.
BA	80.102(e)(2)(i)	A cross-reference to 80.101(g) is added.
BB	80.102(f)(2)(i)	A typographical error is corrected.
BC	80.125(a)	A cross-reference to the reports required by 80.105 is corrected.
BD	80.128(e)(2)	A cross-reference to the assumptions pertaining to the use of RBOB in 80.69(a)(9) is corrected.
BE	80.128(e)(5)	A cross-reference to the sampling and testing rates in 80.69(a)(7) is corrected.
BF	80.128(g)(3)(iii)	A typographical error is corrected.
BG	80.129(e)	A cross-reference to the sampling and testing rates in 80.69 is corrected.

II. Valid Range Limits

The valid range limits in both the Simple and Complex Models specify the range for each fuel parameter outside of which the models cannot be used for the evaluation of emission performances. These limits ensure that the models will not be used for extremely high or low fuel parameter values which would compromise the validity of the models. Thus the valid range limits were instituted as a means toward maintaining the accuracy of the compliance calculations, and thus the integrity of the reformulated gasoline and anti-dumping programs.

The Agency made every attempt to make the valid range limits as wide as possible to provide flexibility to refiners while maintaining a focus on the need for accurate performance estimates. This was especially true for the conventional gasoline valid range limits, as EPA wanted to avoid, to the extent possible, establishing provisions which would require refiners to reformulate their conventional fuels. To provide additional flexibility, the Agency also allowed the extension of the specified valid range for the Complex Model for conventional gasoline when a refiner's individual 1990 baseline fuel exceeds the valid range in one or more fuel parameters.

Since publication of the final rule, the Agency has determined that the flexibility provided to refiners in the valid range limits requires some revision and clarification to avoid unnecessary and costly refinery modifications which have no long term environmental benefit. The changes to the regulations can be separated into two categories: changes to the specified valid range limits, and clarification of the provision for extending the valid range for individual refiner baseline fuels. Both of these topics will be described in detail below.

A. Revised Valid Range Limits

The valid range limits for the Simple and Complex Models were based on two different sets of data and were developed using different assumptions. The Simple Model valid range limits were determined following the regulatory negotiations held in 1991. The Complex Model valid range limits were based upon an examination of the sufficiency of data in the Complex Model database and the accuracy of extrapolations (See the Regulatory Impact Analysis for the final rule, Section IV.D). Because the valid range limits for the Simple and Complex Models were established independently and through different processes, the valid range limits for the two models were different from one another. Since promulgation of the final rule, the Agency has learned that the specified valid ranges may force refiners to make refinery modifications to comply with the regulations that are unwarranted under the Simple Model, and unnecessary under the Complex Model. Thus EPA is revising the valid range limits for oxygen content, RVP, aromatics content, and benzene content for the Simple Model, and oxygen content for the Complex Model.

1. Change to High End of Oxygen Valid Range

The high end of the valid range limit for oxygen in both the Simple and Complex Models was based on the maximum amount of oxygen that an oxygenated fuel was expected to lawfully contain. Of all the oxygenates that will likely be used in the reformulated gasoline program, ethanol has the highest oxygen content at 0.35 grams of oxygen per gram of ethanol. The Agency used this value as a benchmark in determining the high end of the valid range for oxygen, assuming a 10 volume percent ethanol blend. However, since promulgation of the final rule, the Agency has learned that density variations in gasoline blendstocks may result in wide variations in the oxygen content of an oxygenated fuel on a weight percent basis despite the fact that the volume percent remains fixed. For instance, blending 10 volume percent ethanol into a higher density gasoline could produce a blend with an oxygen content as low as 3.4 weight percent, while blending 10 volume percent ethanol into a lower density gasoline could produce a blend with an oxygen content as high as 4.0 weight percent.

Since the largest excise tax exemption available to refiners for the use of ethanol in gasoline blends is for oxygenated fuels that contain 10 volume percent, many ethanol blends will contain 10 volume percent ethanol. Thus it is essential that the high end of the valid range for both the Simple and Complex Models be raised to 4.0 weight percent. This change will allow fuels which are already being produced to be evaluated with the Simple and Complex Models. The change will also guarantee that no fuel oxygenated with ethanol will be excluded from the reformulated gasoline program due to an oxygen content that is outside the range of the model, as long as it complies with the

volume limits applicable in a waiver issued under section 211(f) of the Clean Air Act. Since fuels with oxygen contents of 4.0 weight percent are already being produced, the change will have no additional impact on vehicle driveability. Also, since the models continue to be accurate between 3.5 and 4.0 weight percent, and the emission standards are not being changed, this change to the high end of the valid range for oxygen content will have no adverse impact on the environment.

2. Change to Low End of RVP Valid Range in the Simple Model

The low end of the valid range for RVP in the Simple Model was based on the distribution of data used in the model's development, as well as a consideration of the needs of the reformulated gasoline and anti-dumping programs under the Simple Model. Since VOC emission reductions under the Simple Model are accomplished primarily through limits on maximum RVP levels, the valid range for RVP in the Simple Model only affects toxics compliance calculations. In promulgating the final regulations, the Agency determined that refiners had no incentive to reduce RVP below 6.6 psi for the purposes of complying with the toxics standards since reductions in fuel benzene and aromatics are much more effective in reducing emissions of toxic compounds.

In contrast to the Simple Model, the absence of RVP caps and the impact of other fuel parameters on emissions under the Complex Model will likely result in large variations in RVP levels in reformulated gasoline. RVP control will continue to be the primary mechanism through which VOC emissions are reduced because RVP is the most cost-effective fuel parameter to control, and because the RVP effect on VOC in the Complex Model is quite large. As in the Simple Model, the valid range for RVP in the Complex Model was determined from an examination of the distribution of data used in the model's development and the needs of the reformulated gasoline and anti-dumping programs. The low end of the valid range was set at 6.4 psi to accommodate large reductions in RVP while maintaining the accuracy of the Complex Model. Fuel RVPs are expected to reach this low level in Phase II of the reformulated gasoline program, and the potential exists for them to be reached in Phase I as well.

California has been developing its own program in which reformulated gasoline must meet more stringent requirements than in the federal program during the years 1996 and 1997 that the Simple Model will be in effect. Given California's more stringent requirements, the potential exists for fuel having an RVP of less than 6.6 psi to be either sold or used as a blendstock in and outside of California. With the low end of the valid range for RVP set at 6.6 psi, these California reformulated gasolines might not be certifiable as federal reformulated gasoline. Also, refiners trying to blend down tanks quickly at terminals in the spring to meet summer volatility requirements may end up with fuels that have RVPs as low as 6.4 psi.

Since the low end of the valid range for RVP under the Complex Model is 6.4 psi, the Agency has determined that the low end of the valid range for RVP under the Simple Model should likewise be 6.4 psi. The change from 6.6 psi to 6.4 psi makes the low end of the valid range for RVP consistent throughout Phase I of the federal reformulated gasoline program, and provides an additional element of flexibility for refiners to complement the already established blending and enforcement tolerances. The change should have no effect on the environment, since presumably only cleaner fuels would be allowed certification under the Simple Model. Both the Simple and Complex Models are linear with respect to RVP for all pollutants, and this linear relationship would simply be extended from 6.6 psi down to 6.4 psi.

3. Change to High End of Aromatics Valid Range in the Simple Model

It was and is the intention of the Agency to avoid, to the extent possible, establishing regulations which require refiners to reformulate their conventional fuels. The anti-dumping program is designed to ensure that a refiner's or importer's conventional gasoline stays as clean as it was in 1990, and does not require reformulation beyond those levels. Thus the valid range limits for conventional gasoline in both the Simple and Complex Models were designed to be as wide as possible while simultaneously ensuring the accuracy of the models. As an additional level of flexibility, the Agency also allowed for the extension of the valid range for conventional gasoline if a refiner's individual 1990 baseline fuel exceeded the specified valid range limits (see discussion in Section II.B. below).

Since promulgation of the final regulations for the anti-dumping program, the Agency has determined that the valid range limits in the Simple Model for aromatics, which are more restrictive than those for conventional gasoline under the Complex Model, could be widened without any detrimental impacts on either the program or on the environment. Without such a change to the regulations, refiners may be forced to make changes to their refineries by 1995 that are not necessary in 1998 when compliance under the Complex Model is mandatory. Thus the Agency is changing the high end of the valid range for aromatics under the Simple Model from 45 volume percent to 55 volume percent. This change will ensure that the Simple Model can be used for as many conventional fuels as possible to show compliance under the anti-dumping program without the need to extend the valid range. The environment will not be adversely impacted since it was the Agency's intent to allow extensions of the valid range when a refiner's 1990 baseline fuel exceeded the specified valid range limits. The change will not affect RFG compliance, since aromatics are controlled by the reformulated gasoline standards for toxics. Driveability will not be affected since fuels with aromatics levels as high as 55 volume percent currently exist in-use. Also, consistency in the high end of the valid range limits for aromatics will be maintained throughout Phase I of the program. Because the relationship between toxic emissions and fuel aromatics levels is linear in the Simple Model, the change will not result in an inaccurate application of the model to higher aromatics levels.

4. Change to Low End of Aromatics Valid Range in the Simple Model

The Agency has also determined that the low end of the valid range for aromatics in the Simple Model may not provide refiners with adequate flexibility under the reformulated gasoline program. For the Complex Model, the Agency determined that the relationships between aromatics and emissions could not be trusted at levels below 10 volume percent. However, the Agency determined that a flat-line extrapolation below 10 volume percent, in which no emission benefits or detriments result from lowering aromatics values below 10 volume percent, would provide greater flexibility without compromising the accuracy of the Complex Model equations in this range. Since promulgation of the final rule, the Agency has determined that the Complex Model approach to low values of aromatics can be appropriately applied to the Simple Model as well. Therefore, the Agency is changing the low end of the valid range for aromatics

under the Simple Model from 10 volume percent to 0 volume percent, but will not allow any emission benefits in this range. The Agency did not intend to discourage the production of fuels that had very low levels of aromatics, and were, thus, qualitatively considered to be cleaner burning. If the low end of the valid range for aromatics is left at 10 volume percent, fuels with aromatics values of less than 10 volume percent that would otherwise be complying reformulated gasolines under the Simple Model will not be certifiable, despite the fact that those same fuels may be certifiable under the Complex Model. This change is expected to be environmentally benign, as few refiners will have any incentive to reduce aromatics below 10 volume percent for reformulated gasoline under the Simple Model.

5. Change to High End of Benzene Valid Range in the Simple Model

As stated in Section II.A.3, it was and is the intention of the Agency, to the extent possible, not to establish regulations that require the reformulation of conventional gasoline under the anti-dumping program. However, the valid range limits for benzene under the Simple Model may in fact force refiners to reformulate conventional gasoline. The Agency has determined that the valid range limits in the Simple Model for benzene, which are more restrictive than those for conventional gasoline under the Complex Model, can be widened without any detrimental impacts. Without such a change to the regulations, refiners may be forced to make changes to their refineries by 1995 that are not necessary in 1998 when compliance under the Complex Model is mandatory. Thus the Agency is changing the high end of the valid range for benzene under the Simple Model from 2.5 volume percent to 4.9 volume percent. This change ensures that the Simple Model can be used for as many conventional fuels as possible to show compliance under the anti-dumping program without the need to extend the valid range. The change will not affect RFG compliance, since benzene is controlled by the reformulated gasoline standards for fuel benzene content. In like manner to raising the high end of the valid range for aromatics, consistency in the valid range limits will be maintained throughout Phase I of the program. The environment will not be adversely impacted since it was the Agency's intent to allow extensions of the valid range when a refiner's 1990 baseline fuel exceeded the specified valid range limits. As for aromatics, because the relationship between toxic emissions and fuel benzene levels is linear in the Simple Model, the change will not result in an inaccurate application of the model to higher benzene levels.

B. Extending the Valid Range for Conventional Gasoline

Under the anti-dumping provisions of the final rule, refiners use their individual 1990 baselines to determine compliance with the regulations under both the Simple and Complex Models. Depending on the compliance model being used, the values for particular fuel parameters are restricted by the valid range limits. For instance, if a refiner is using the Simple Model to comply with the anti-dumping regulations, VOC and NO_X emissions are regulated through caps on the baseline levels of sulfur, olefins, and T90, while toxic emissions are regulated through an equation giving the benzene fraction of VOC emissions. Since the benzene fraction equation contains only benzene and aromatics as independent variables, the only valid range limits that apply to refiners using the Simple Model to comply with the anti-dumping regulations are those specified in § 80.42(c)(1) for benzene and aromatics content. If, alternatively, a refiner is using the Complex Model to comply with the anti-dumping regulations, NO_X and toxics emissions are regulated through the Complex Model. Thus the valid range limits that apply to refiners using the Complex Model to comply with the anti-dumping regulations are those specified in § 80.45(f)(1)(ii) for oxygen content, sulfur content, RVP, E200, E300, aromatics content, olefins content, and benzene content.

Section 80.91(f)(2)(ii) allows a refiner to extend the conventional gasoline valid range for the Complex Model if one or more of the fuel parameter values for its individual 1990 baseline fuel falls outside of the valid range specified in § 80.45(f)(1)(ii). However, the regulations did not adequately specify the method, applicability, or limitations of such a valid range extension. As written, the regulations state that, for each baseline fuel parameter value which is outside of the Complex Model conventional gasoline valid range, the Complex Model valid range is extended only for such fuel parameters. The only stated limitation is that such an extension is applicable only to the applicable summer or winter season. The Agency has determined that this portion of the regulations is ambiguous, and requires revision.

1. Applicability of the Provision for Valid Range Extension

The Agency has only been made aware of the potential need for extension of the valid range for olefins, aromatics, and benzene. Therefore, a provision for the extension of the valid range has only been made for the high end of the specified valid range for these three fuel parameters. In each case, if the valid range limit is extended, the refiner in question must still be limited by a valid range to eliminate the possibility that the Complex Model will be used for aromatics, olefins, and/or benzene values that are very high, which might compromise the primary objective of the anti-dumping program. As specified in the final regulations, a refiner is allowed to extend the Complex Model valid range for both baseline and compliance emissions calculations, but is not directed as to the specification of any new valid range limits. Such a provision for the extension of the valid range that does not include limitations on fuel parameter values that can be evaluated with the Complex Model would defeat the purposes of specifying a valid range, and was not the Agency's intent.

The Agency has determined that the best approach to limiting the extension of the valid range is to allow target fuels to have values at least up to the baseline level. Since the baseline fuel is an "average" fuel of sorts, the Agency has also determined that refiners should be given some flexibility beyond the baseline value. For aromatics, this flexibility will be fixed at a value of 5.0 volume percent. For olefins this flexibility will be fixed at a value of 3.0 volume percent. And for benzene this flexibility will be fixed at a value of 0.5 volume percent. Thus, for example, the extended valid range limit for aromatics would be equal to the individual refiner's baseline fuel value for aromatics, plus 5.0 volume percent. A similar calculation would be necessary for extending the valid range for olefins or benzene.

The Agency has no reason to believe that provisions for the extension of the valid range for fuel parameters other than aromatics, olefins, and benzene on either the low or high ends are necessary. For instance, the Complex Model conventional gasoline valid ranges for oxygen, sulfur, aromatics, olefins, and benzene all have 0.0 as their lower limit. Thus no valid range extension would be required on the low end of the valid range for these fuel parameters. Similarly for E300, a fuel can have an E300 value of no higher than 100 percent, which is also the high

end of the specified valid range. Other limitations, such as ASTM specifications and the volatility rule, should eliminate the need for valid range extensions in other cases.

2. No-Benefit Limitation of the Provision for Valid Range Extension

The Agency continues to believe that the valid range limits specified in § 80.42(c)(1) and § 80.45(f)(1)(ii) identify the fuel parameter values beyond which the compliance models are not considered accurate. Thus the Agency has determined that any extension of the specified valid ranges for conventional gasoline should incorporate flat-line extrapolation. Under flat-line extrapolation, the compliance models provide no emissions benefit or detriment when raising the value of either aromatics or olefins above the values specified in § 80.42(c)(1) and § 80.45(f)(1)(ii). This flat-line extrapolation will apply to both the baseline fuel and any target fuels evaluated with the compliance models under the anti-dumping regulations.

3. Expanding the Applicability of the Valid Range Extension Provision to the Simple Model

This direct final rule expands the applicability of the valid range extension provision given in § 80.91(f)(2)(ii) to the Simple Model. However, as noted above, the only fuel parameters having valid range limits under the Simple Model anti-dumping regulations are aromatics and benzene content. The Simple Model valid ranges for both aromatics and benzene are being expanded to be equal to the corresponding ranges for the Complex Model, as described in sections II.A.3–5 of this rule. Thus the new valid range under the Simple Model will be 0–55 volume percent for aromatics and 0–4.9 volume percent for benzene. No valid range extension will be required for either of these fuel parameters on the low end of the valid range. Thus the only relevant valid range extensions that would be necessary for the Simple Model would be for the high end of aromatics and the high end of benzene.

III. Complex Model

The Complex Model includes separate calculations for exhaust and nonexhaust emissions. The final regulations contained errors in the model descriptions for both exhaust and nonexhaust. The errors in the exhaust portion of the Complex Model were limited to the linear extrapolation methodology, while the errors in the nonexhaust portion arose in the VOC equations themselves. Another error also arose in the calculation procedure for annual average toxics. Each of these errors and the associated corrections will be discussed in detail below.

A. Extrapolation

The exhaust portion of the Complex Model is a statistically-derived set of equations relating fuel parameters to emissions of VOC, NO_X, benzene, 1,3-butadiene, acetaldehyde, formaldehyde, and POM. The Agency determined the conditions under which these exhaust equations must be linearly extrapolated based on the ranges for each fuel parameter within which the equations were considered to be accurate. Linear extrapolation amounts to fixing the slope of the fuel parameter:emission relationship at a constant value. It is used to extend the equations beyond the limits of the data on which they are based, thereby making the reformulated gasoline and anti-dumping programs as flexible as possible.

Of the six separate models in the exhaust portion of the Complex Model, all four toxic models are linear, and thus do not require linear extrapolation. Paragraph (c)(1)(iv) of § 80.45 specifies the conditions and limitations of linear extrapolation for VOC, while § 80.45(d)(1)(iv) specifies the conditions and limitations of linear extrapolation for NO_X. The details of the linear extrapolation methodology included in these two portions of the final regulations contained a number of errors which require correction.

1. Correct Parenthetical Form of Extrapolation Equations

In paragraphs (c)(1)(iv)(B) and (d)(1)(iv)(B) of § 80.45, the linear extrapolation equations contained too many brackets in some regions of the equations, and missing parentheses in other regions. Although these inadvertent omissions and insertions did not change the mathematical nature of the equations, a literal copying of the equations into computer code would result in an error. Thus the Agency has corrected the linear extrapolation equations for both VOC and NO_X to contain the correct number of parentheses and brackets in the correct position and order.

2. Correct Missing Sulfur Term in NO_X Extrapolation Equation

A sulfur term was inadvertently left out of both the Phase I and Phase II NO_X extrapolation equations given in paragraph (d)(1)(iv)(B) of § 80.45. This missing sulfur term represents the linear extrapolation of the NO_X model with respect to sulfur for high emitters. This correction will have a negligible impact on the emission performance estimates provided by the Complex Model because the NO_X equation for high emitters is essentially linear with respect to sulfur.[1] The inclusion of the correct sulfur term in the NO_X extrapolation equation will result in the correct application of the edge target fuel to the NO_X extrapolation equations.

3. Clarify E300 Extrapolation Above 95 Percent

In the process of determining the valid range limits for the use of the Complex Model for both reformulated and conventional gasoline, the Agency determined that the emission changes estimated by the exhaust equations were not accurate above an E300 value of 95 percent. However, comments received from the refining industry indicated a need for an E300 valid range that extended up to 100 percent. The Agency concluded that, although the exhaust equation emission change estimates could not be considered accurate above an E300 level of 95 percent, allowing only a zero change in emissions above this E300 level would ensure that refiners could not receive inappropriate benefits for fuels with very high E300 levels. Therefore, the Agency allowed for flat-line extrapolations of all exhaust equations between the E300 values of 95 and 100 percent. However, some portions of the regulations that specified this allowance contained typographical errors which substantially changed the manner in which this flat-line extrapolation for E300 was to be executed. Specifically, paragraphs (c)(1)(iv)(C)(*5*), (c)(1)(iv)(D)(*5*), and (d)(1)(iv)(C)(*5*) of § 80.45 all indicated that the E300 value of the *edge* target fuel should be held constant at 95 volume percent for target fuels having an E300 value of greater than 95 volume percent. These paragraphs should not have refered to the *edge* target fuel, but rather to the *target* fuel for the purposes of determining emissions performances with the Complex Model. These three paragraphs are thus changed accordingly.

4. Correct Value of ΔARO

The regulations describing the linear extrapolation methodology for exhaust VOC and NO_X contained two other typographical errors that nevertheless were substantial in their effects. The

[1] The exhaust portion of the Complex Model includes exponential functions which alters the traditional implications of first- and second-order equations. However, the Complex Model exhaust equations can be referred to and approached as first- and second-order as described in Section IV.D.1 of the Regulatory Impact Analysis for the final rule.

first arose in paragraphs (c)(1)(iv)(C)(*9*), (c)(1)(iv)(D)(*9*), and (d)(1)(iv)(C)(*9*) of § 80.45 in the specification of the value of ΔARO. The value of ΔARO should generally be set equal to (ΔARO—18 volume percent) for any target fuel having an aromatics content of less than 18 volume percent. Thus ΔARO will be negative when the VOC or NO_X equation is linearly extrapolated with respect to aromatics at the low end of the valid range. However, for target fuels having an aromatics content of less than 10 volume percent, the VOC extrapolation should be flat-line instead of linear. In this case, ΔARO should be fixed at a value of −8 volume percent. The value in the regulations was given incorrectly as +8 volume percent.

5. Correct Specification of ΔE300

The second typographical error that requires explanation and correction involves the specification of ΔE300 in paragraphs (c)(1)(iv)(C)(*13*) and (c)(1)(iv)(D)(*13*). The first sentence in each of these two paragraphs contains two conditions that must be met for ΔE300 to be set equal to (E300—94 percent). The first condition incorrectly states that the E300 level of the target fuel must be *less* than 94 percent, when in fact the condition should state that the E300 level of the target fuel must be *greater* than 94 percent. The remainder of both of these paragraphs is correct.

6. Eliminate References to E300 in NO_X Extrapolation

Finally, the linear extrapolation methodology for NO_X in the final rule contained references to the allowable range for E300, despite the fact that the NOx equation is not extrapolated with respect to E300. Thus all references to E300 in paragraphs (d)(1)(iv)(A) and (d)(1)(iv)(B) are removed by this direct final rule. Note that, since all exhaust equations in the Complex Model are flat-line extrapolated for E300 values greater than 95 percent, the flat-line extrapolation for E300 specified in paragraph (d)(1)(iv)(C)(5) is correct (except for the changes described above).

B. Nonexhaust Model

The equations giving nonexhaust VOC as a function of RVP for the Complex Model were originally proposed in the February 1993 NPRM (58 FR 17175). No changes to those equations were intended for the final rule on reformulated gasoline. However, typographical errors arose in a number of the coefficients in the nonexhaust VOC model when they were entered into the final regulations. These errors would have a small, but not insignificant impact on the VOC emission performances provided by the Complex Model.

The errors in the nonexhaust VOC portion of the Complex Model lay in four places. The first was in the sign of the coefficient for RVP in the Phase I running loss equation for Region 1. The second was in the coefficient for RVP in the Phase II hot soak equation for Region 1. The third was in the coefficient for RVP in the Phase II refueling loss equation for Region 1. And the fourth was in the sign of the RVP coefficient for the Phase II running loss equation for Region 2. All the coefficients in the nonexhaust model have been returned to their proper values and signs by this direct final rule.

C. Annual Average Calculations

Since the averaging standards for toxics under the Complex Model are year-round standards, each refiner who is complying under an averaging scenario must determine the average year-round toxics emissions performance for the fuels that it sold during a given year. Each batch of fuel is uniquely associated with toxic emissions as estimated by the Complex Model. Thus refiners require a method for combining per batch emission performances into a single year-round value. The regulations provided two contradictory methods for combining per batch emission performances into such a single year-round value.

Paragraph (g) *et al.* of § 80.67 directs refiners to weight the emission performances by batch volume and then add them in order to determine a year-round value. In calculating emission performances with the Complex Model, fuels sold in the winter are evaluated with the winter model, while fuels sold in the summer are evaluated with the summer model. Thus this "volume-weighted" approach to determining year-round values correctly leads to an average toxic emissions value for the year.

Paragraph (e)(3) of § 80.45 incorrectly directs refiners to weight summer and winter toxic emissions by fixed values to obtain year-round averages. Under this portion of the regulations, summer batches of fuel would be individually weighted by their batch volumes to obtain average summer emission performance estimates. Likewise winter batches would be weighted by their batch volumes to obtain average winter emission performance estimates. However, the fixed weighting of summer and winter emission estimates for the purposes of determining a year-round value would not necessarily mimic a refiner's true ratio of summer to winter fuel. The fixed weightings given in paragraph (e)(3) were used to determine the performance standards, and are not relevant to determining compliance by individual refiners. Therefore, paragraph (e)(3) will be revised to refer to § 80.67(g), and paragraphs (e)(3)(i) and (e)(3)(ii) of § 80.45 will be removed.

IV. Enforcement Corrections and Clarifications

The following section contains corrections and clarifications to the enforcement portions of the final reformulated gasoline and anti-dumping regulations that were published on February 16, 1994 (59 FR 7716), and to enforcement portions of the preamble of the notice of final rulemaking.[2] The reasons for the changes are listed below.

A. Reformulated Gasoline Regulation (40 CFR Part 80, Subpart D)

1. Measurement of Reformulated Gasoline Fuel Parameters (§ 80.46)

The table of aromatic compounds in § 80.46(f)(1)(ii)(K) is being revised. The aromatic compounds listed in the final rule are those used by EPA during the development of the analytical method for the rulemaking. In this notice some compounds that no longer are available commercially have been deleted from the list, and several aromatic compounds that are found in commercial gasolines and are available commercially to make reference materials have been added to the list. Only materials of known purity or those specified as 99% pure or greater should be used as calibration standards.

The number of calibration levels should be sufficient to bracket the expected concentration of each compound. Two calibration levels were used in the initial evaluation of the test method. In the future, however, EPA probably will use five calibration levels with at least three internal standards used in the standards and samples in order to improve precision.

Initially EPA prepared standards by volume. Currently, however, EPA prepares standards, samples, and internal standards by weight. Conversion to volume percent is performed by using the density of the aromatic compound in question. Standards for gasoline that are prepared by weight are considered to be more accurate than standards that are prepared by volume.

[2] Hereinafter in Part IV of this notice (unless otherwise indicated), references to "final rule" or "final regulations" shall refer to the regulations promulgated in the February 16, 1994, notice of final rulemaking.

Neither the use of five calibration levels, nor the preparation of standards by weight, should be viewed as changes to the regulations, but rather as Agency recommendations intended to improve precision.

2. General Requirements for Refiners, Importers and Oxygenate Blenders (§ 80.65)

a. *Designation of Gasoline as Oxygenated Fuels Program Reformulated Gasoline (OPRG) or Non-OPRG.* Section 80.65(d)(2)(iii) is revised in order to clarify the categories of gasoline that may be designated as oxygenated fuels program reformulated gasoline, or OPRG. The final rule, at § 80.65(d)(2)(iii), specifies that reformulated gasoline must be designated as OPRG, or not OPRG, to provide a mechanism to ensure reformulated gasoline outside of oxygenated fuels control areas during oxygenated fuels control periods has at least the 2.0 weight percent oxygen content mandated by the Clean Air Act.[3] The final rule requires parties who meet the oxygen standard on average to meet the oxygen standard separately for gasoline not designated as OPRG. If OPRG and non-OPRG gasoline could be averaged together for oxygen purposes, the gasoline in the OPRG areas—where 2.7 weight percent oxygen is required during the oxygenated fuels control period—could be used to offset gasoline with 1.5 weight percent oxygen intended for use in non-OPRG areas.

Today's revision consists of two parts. First, the regulation is clarified to make specific that the OPRG/non-OPRG designation applies only to reformulated gasoline and not to RBOB. The final rule requires RBOB to be designated as OPRG or non-OPRG, but the OPRG designation for RBOB serves no purpose because RBOB does not become reformulated gasoline until oxygenate has been added. The final rule is unchanged regarding oxygenate blender responsibilities—oxygenate blenders who produce reformulated gasoline by combining RBOB with oxygenate are required to designate the gasoline as OPRG or non-OPRG, and to meet the oxygen standard separately for gasoline not designated as OPRG.

The second change regarding OPRG-designated gasoline is the addition of a new provision, at § 80.65(d)(2)(iii)(B), to clarify that reformulated gasoline that contains at least 2.0 weight percent oxygen may be designated as OPRG regardless of whether or not the gasoline is used in an oxygenated fuels program control area during an oxygenated fuels program control period. This change allows terminals that serve both oxygenated fuels areas and non-oxygenated fuels areas to stock a single reformulated gasoline that could be used in both areas, instead of having to stock both OPRG and non-OPRG designated reformulated gasoline. This change also allows all reformulated gasoline that meets the 2.0 weight percent oxygen per-gallon standard to be designated as OPRG, without such gasoline being restricted to use in oxygenated fuel areas during oxygenated fuel control periods.

A terminal thus could stock reformulated gasoline that contains 2.7 weight percent oxygen and, therefore, that meets the oxygenated fuels oxygen requirement, and deliver this gasoline into both OPRG and non-OPRG markets. A terminal also could stock reformulated gasoline that contains 2.0 weight percent oxygen for delivery into both OPRG and non-OPRG markets, and splash blend additional oxygenate with those batches of gasoline that are delivered into the oxygenated fuel area during the oxygenated fuel control period.[4]

This change, however, keeps intact the regulatory mechanism for ensuring non-OPRG areas receive reformulated gasoline that contains at least 2.0 weight percent oxygen. Any reformulated gasoline used outside an oxygenated fuels control area during an oxygenated fuels control period that contains less than 2.0 weight percent oxygen (and therefore must be designated as non-OPRG) must be offset with other non-OPRG reformulated gasoline that contains more than 2.0 weight percent oxygen, such that the average oxygen content of the non-OPRG gasoline is greater than or equal to the 2.1 weight percent average standard.

b. *Designation of Complex Model Gasoline as Meeting NO_X Standard on Per-Gallon or Average Basis.* Section 80.65(d)(2)(v)(B) is revised in order to clarify that refiners and importers are required to specify whether the NO_X standard is being met on a per-gallon basis or on average only for gasoline certified under the complex model. There is no separate NO_X standard under the simple model.

c. *Designation of Reformulated Gasoline Blendstock for Downstream Oxygenate Blending (RBOB).* Section 80.65(d)(2)(vi) is being revised in order to clarify that refiners and importers have three options regarding the designation of reformulated gasoline blendstock for downstream oxygenate blending (or RBOB). A refiner or importer has three options for the types of RBOB that may be produced or imported: as suitable for blending with any oxygenate, with ether only, or with a refiner- or importer-specified oxygenate type and amount. The gasoline designation requirements at § 80.65(d)(2)(vi) as promulgated in the final rule did not include the refiner- or importer-specified oxygenate option for RBOB, making this provision inconsistent with the downstream oxygenate provisions at § 80.69(a) that specifies the RBOB options and includes the refiner- or importer-specified option, and the product transfer document requirements for RBOB at § 80.77(i)(2) that includes all three options. In order to correct this inconsistency, today's revision adds the refiner- or importer-specified option to the RBOB designation requirement.

d. *Assignment of Batch Numbers.* Section 80.65(d)(3) requires refiners and importers to assign a unique number to each batch of reformulated gasoline that is produced or imported, and this section includes an example of such a batch number. The numbers contained in the example are being modified to reflect the correct number of digits for the portion of the batch number that states the EPA-assigned facility registration number (five digits) and the sequential batch number (six digits).

e. *Computer-Controlled In-Line Blending Exemption.* Section 80.65(e)(1) requires each refiner or importer to obtain test results for each batch of reformulated gasoline prior to the gasoline leaving the refinery or import facility. Refiners who produce reformulated gasoline using a computer-controlled in-line blending process in which the gasoline is blended directly to a pipeline, however, will not have the test results for the "batch" prior to the release of at least some, if not all, of the gasoline. To correct the incompatibility between this requirement and the nature of the computer-controlled in-line blending process, the § 80.65(f)(4) exemption from independent sampling and testing for refiners that produce reformulated gasoline using computer-controlled in-line blending equipment is expanded to include an exemption from the § 80.65(e)(1) requirement that refiners have test results for each batch prior to the gasoline leaving the refinery.

[3] The "oxygenated fuels control areas" are those areas where the use of oxygenated gasoline is required during the winter season pursuant to section 211(m) of the Clean Air Act, 42 U.S.C. 7545(m).

[4] Section 80.78(a)(6) prohibits adding oxygenate to reformulated gasoline, except in the case of reformulated gasoline that is designated as OPRG and is used in an oxygenated fuels program control area during an oxygenated fuels program control period.

f. *Release of Reformulated Gasoline Certified Under Simple Model as Not VOC-Controlled.* Section 80.65(e)(1) is also revised in order to clarify that reformulated gasoline certified under the simple model that is not VOC-controlled may be released from the refinery or import facility after the refiner or importer has test results for oxygen and benzene only. The final rule requires refiners and importers to have RVP test results in hand prior to release of all simple model-certified reformulated gasoline, but the RVP standard applies under the simple model only to VOC-controlled gasoline.

g. *List of Reformulated Gasoline Properties to be Established by Testing.* Section 80.65(e)(2)(i) contains a list of reformulated gasoline properties that must be established by testing. This list in the final rule includes 50% distillation (T–50) and 90% distillation (T–90) (the temperatures in degrees F at which 50% and 90% of a liquid are evaporated). This list is being revised to add terms for E200 and E300 (the percent of a liquid that are evaporated at 200 and 300 degrees F). E200 and E300 are correlated with T–50 and T–90, and may be approximated from T–50 and T–90 measurements using conversion equations. The most accurate way of determining the E200 and E–300 of gasoline, however, is using ASTM–86–90, the distillation test method specified at § 80.46(d). As a result, the list of mandatory testing is being expanded to include the E–200 and E–300 terms.

This expansion does not constitute a change from the mandatory testing requirements for reformulated gasoline, because the E200 and E300 terms are established as part of the ASTM–86–90 distillation test that already is required. The correlation ranges for E–200 and E–300, 2.5 vol% and 3.5 vol% respectively, that are included in the § 80.65(e)(2)(i) table are the reproducibility figures for these terms from the ASTM test, and are comparable to the five degrees F correlation range provided for the T–50 and T–90 terms.

h. *Reconciliation of Test Results.* Section 80.65(e)(2)(ii)(A) is being revised to clarify one option for reconciling reformulated gasoline test results from a refiner's or importer's laboratory as compared with test results from an independent laboratory. Under this option, where the refiner's or importer's test result for any parameter is not confirmed, the refiner or importer would use the result for that parameter that is the "worst case" for the refiner or importer ("best case" for the environment). Under this option in the final rule, the smaller of the two results for oxygenates is used for calculating all standards except RVP.

This option is being revised to refer to oxygenates as a class without separately naming each oxygenate. This change will keep the option from becoming dated if any new oxygenates are used in reformulated gasoline. The option also is being revised to eliminate the larger oxygenate volume assumption in the case of RVP, because RVP is a parameter that is measured directly. Any oxygenate effect on RVP will be measured in the RVP test and would not be changed by a calculation using the "worst case" oxygenate level.

i. *Attest Engagement Requirement.* Section 80.65(h) is being revised to specify that the attest engagement requirement applies to oxygenate blenders who meet the oxygen standard on average, and not to oxygenate blenders who meet the oxygen standard on a per-gallon basis. This change conforms § 80.65(h) with § 80.69(b)(4) which limits the attest engagement requirement to oxygenate blenders who average.

3. Compliance Surveys (§ 80.68)

Section 80.68(c)(13) is being revised to clarify when VOC and NO_X emissions reduction calculations must be reported to EPA by the surveyor under the gasoline quality survey requirements.[5] VOC emissions reduction calculations must be reported only for surveys during June 1 through September 15 of each year, including simple model surveys where a specified simple model VOC emissions reduction equation is cross-referenced. NO_X emission reduction calculations must be reported for all complex model surveys before January 1, 2000, and beginning on January 1, 2000 for surveys outside the period June 1 through September 15. NO_X surveys are not required during June 1 through September 15 under Phase II (beginning on January 1, 2000) because the Clean Air Act's restriction on NO_X increases is satisfied through the NO_X reductions required for VOC-controlled reformulated gasoline under Phase II. The rationale for this approach for NO_X surveys is discussed at 59 FR 7773 (February 16, 1994).

4. Covered Areas (§ 80.70)

a. *Putnam and Orange Counties, New York.* In order to correct an oversight in the final rule, § 80.70(d)(3) is being amended to include Putnam and Orange Counties, New York, as part of the New York-Northern New Jersey-Long Island-Connecticut "covered area." These counties are part of the New York City CMSA and are thus appropriately part of the New York City reformulated gasoline covered area. See 57 FR 13444 (April 16, 1992). Putnam and Orange Counties are also included in the New York City CMSA for purposes of the oxygenated fuels program requirements.

b. *Bullitt and Oldham Counties, Kentucky.* Section 80.70(j) is being amended to specify the applicable boundaries for the portions of Bullitt and Oldham Counties, Kentucky, that are nonattainment areas.

c. *Essex County, New York.* The listing of Essex County, New York, is also being amended to include a specific description of the nonattainment area.

d. *Smyth County, Virginia.* Section 80.70(j) is also being amended to delete Smyth County, Virginia, as a covered area for the reformulated gasoline program. This area was expressly excluded from coverage in the Governor's opt-in request and should not have been included in the regulatory list of covered areas.

e. *Richmond, Virginia.* An erroneous reference to the City of Richmond is also being corrected.

5. Reporting Requirements (§ 80.75)

a. *Sulfur, NO_X* and T90 Averaging Reports

Section 80.41(h)(2) of the final rule requires that refiners and importers subject to the simple model meet their 1990 baseline sulfur, olefins and T90 levels on average for the entire year. However, it does not include a requirement to report the average values of these properties to EPA. It was the Agency's intention to have these values reported and so an additional reporting requirement for sulfur, olefins and T90 is being added at § 80.75(b)(2). In addition, the RVP averaging reporting requirements are being renumbered, under § 80.75(b)(1), so that the sulfur, olefin and T90 averaging reporting requirements may be included under § 80.75(b).

b. *Oxygen Averaging Reports.* Section 80.75(f)(2)(ii)(A) is being revised to conform the categories of reformulated gasoline that must be reported separately for oxygen averaging purposes to the categories that are specified in the oxygen averaging section, at § 80.67(h)(1)(v)(A).

6. Registration Requirements (§ 80.76)

The Agency is making several revisions to the registration requirements in § 80.76(c) of the final rule. EPA is removing the requirement to indicate where off-site records are kept from the refiners', importers' and

[5] This notice is also adding the paragraph number for this provision, which was inadvertently omitted in the notice of final rulemaking.

oxygenate blenders' registration information, and instead requiring that information be submitted for each refinery, oxygenate blending facility, and in the case of importers, operations within each PADD. The registration requirement to indicate what type of gasoline each refinery or oxygenate blending facility will produce (reformulated, RBOB, conventional or blendstocks) has been removed because the Agency believes that it is not necessary for registration purposes. The Agency intended that importers would identify the independent laboratories used to comply with the independent sampling and testing requirements, but there was no specific regulatory text requiring them to do so. This notice requires each importer to provide that information to EPA for its operations in each PADD.

7. Product Transfer Documentation (§ 80.77)

a. *Minimum and/or Maximum Standards.* Section 80.77(g)(2), which requires that per-gallon minimum/maximums must be included in product transfer documents, is being revised to clarify the categories of reformulated gasoline for which these values must be specified. Paragraphs (g)(2)(iii), (g)(2)(iv)(A), and (g)(2)(iv)(B) of § 80.77 are being revised to specify that the RVP maximum and the VOC emissions performance minimum must be included only for VOC-controlled reformulated gasoline, because these standards apply only to VOC-controlled gasoline. Paragraphs (g)(2)(iv)(A) and (g)(2)(iv)(B) of § 80.77 also are being revised to specify that the NO_X minimum must be included only for reformulated gasoline certified using the complex model. There is no separate NO_X standard under the simple model.

b. *VOC-Controlled Gasoline That Contains Ethanol.* Section 80.77(g)(3) is being added to require that product transfer documents must identify any VOC-controlled reformulated gasoline that contains any ethanol as an ethanol-containing reformulated gasoline, so that downstream parties will have sufficient knowledge to avoid violation of the prohibition, at § 80.78(a)(8), against combining VOC-controlled reformulated gasoline produced using ethanol with VOC-controlled reformulated gasoline produced using any other oxygenate during the period January 1 through September 15.

c. *Complex Model Gasoline Certified Prior to 1998.* Section 80.77(h) is being revised to clarify that the product transfer document requirements related to gasoline certified using the complex model before January 1, 1998, apply to reformulated gasoline and RBOB. The final rule makes reference to "gasoline" and RBOB without specifying "reformulated gasoline," which could have caused confusion.

8. Controls and Prohibitions (Section 80.78)

Section 80.78(a)(1)(v)(B) and (a)(1)(v)(C), concerning reformulated gasoline prohibited activities, are being revised to clarify that gasoline subject to the per-gallon RVP maximum must have an RVP that is less than or equal to this standard, and that gasoline subject to the VOC and NO_X emissions reduction minimum must have emissions reductions that are greater than or equal to these standards. The final rule describes these requirements only in terms of gasoline that is "less than" or "greater than" these standards, while gasoline that equals these standards also is in compliance.

9. Enforcement Exemptions for California Gasoline (§ 80.81)

a. *Definition of California Gasoline.* The final rule was intended to extend the California enforcement exemptions to gasoline produced at refineries outside California that produce only California reformulated gasoline and federal conventional gasoline. See 59 FR 7759, col. 3 (February 16, 1994). However, the regulatory definition of "California gasoline" could be read to exclude non-California refineries producing California reformulated gasoline from the enforcement exemptions. Therefore, § 80.81(a)(2)(iii) is clarified to exclude from this definition only gasoline produced by non-California refineries that are also producing reformulated gasoline for sale in covered areas outside California.

b. *Compliance Demonstration Submittal.* Section 80.81(b)(4) requires refiners, importers, and oxygenate blenders to submit the compliance demonstration mandated by § 80.81(b)(3) by May 31, 1996 "along with reports required to be submitted under § 80.75(a)(1)." The quoted language is corrected to make clear that the compliance demonstration should accompany the report for the first quarter of 1996 due to be submitted on that date under § 80.75(a)(1)(i).

c. *Use of California Sampling and/or Testing Methodologies.* Section 80.81(h) allows refiners and importers of California gasoline to use sampling and test methods that are set forth in the California reformulated gasoline regulations, in lieu of those methods prescribed under § 80.46 for the federal reformulated gasoline program. This provision is being revised to clarify that these California-approved sampling and test methods may be used only with California gasoline, and that these methods may not be used to satisfy the sampling and testing requirements for reformulated or conventional gasoline that does not meet the definition of California gasoline.

B. Anti-Dumping Regulations (40 CFR Part 80, Subpart E)

1. Standards Applicable to Refiners and Importers (§ 80.101)

a. *Compliance Baseline Formula.* Section 80.101(f)(4) currently provides that refiners and importers who use an individual 1990 baseline, and who increase their gasoline production volume above a certain level, must calculate a compliance baseline for each averaging period. EPA has combined the separate formulas for "V_{eq}" and "CB_i" in § 80.101(f)(4) into a single, simpler formula.

In addition, EPA has specified that the denominator of the compliance baseline equation includes the volume of California gasoline. The final rule excluded the volume of California gasoline produced in 1995 and thereafter from the compliance baseline equation, but this exclusion rendered this equation invalid for refiners of California gasoline because the numerator of this equation includes gasoline produced for the California market in 1990. In order to constitute a valid comparison of the volume of gasoline produced in 1990 versus the volume produced in 1995 and thereafter, both the numerator and the denominator of the compliance baseline equation must contain the volume of gasoline produced for the California market. This approach for including California gasoline in the compliance baseline equation is equivalent to the requirement that reformulated gasoline produced for use in covered areas outside the State of California must be included in the denominator of the compliance baseline equation.

The definitions of the factors "DB_i," "CB_i," and "B_i," are clarified to bring them in conformance with the terms used in the complex model calculations under § 80.101(g).

b. *Compliance Calculations.* Section 80.101(g), entitled "Compliance Calculations," is restructured to reverse the order of the simple model calculation formula currently in § 80.101(g)(1)(i) and the formula for determining the average value for the parameter being evaluated currently in § 80.101(g)(1)(ii). This organizational change is necessary because in order to perform the simple model calculation

for exhaust benzene emissions, the refiner or importer must first determine the average value for certain parameters. In addition, and for purposes of clarity, the heading "Simple Model Calculations" is inserted as a new paragraph (i) under § 80.101(g)(1), and the heading "Complex Model Calculations" is inserted as a new paragraph (ii) under § 80.101(g)(1). These changes restructure the compliance calculations in a logical sequence that will make this section clearer for compliance purposes.

The formula definition of "SG_i" in § 80.101(g)(1)(i)(A) is amended to clarify that the specific gravity term only applies to calculations involving sulfur.

The definitions of the factors "BZ" and "AR" under § 80.101(g)(1)(i)(B), pertaining to compliance calculations for exhaust benzene emissions under the simple model, are clarified as to how these are calculated by expanding them to read "calculated per paragraph (g)(1)(i)(A) of this section."

Section 80.101(g)(1)(iii), (g)(1)(iv), and (g)(1)(v), pertaining to complex model calculations, are consolidated and simplified as a new § 80.101(g)(1)(ii).

c. *Sampling and Testing.* Section 80.101(i)(1), which concerns requirements for sampling and testing of conventional gasoline and other products to which the compliance standards apply, is being revised to delete the requirement that such sampling and testing be conducted prior to the gasoline or product leaving the refinery. This change is necessary because this requirement interferes with the ability of refiners and importers to do composite sampling and in-line blending.

2. Controls Applicable to Blendstocks (§ 80.102)

Since gasoline produced for and marketed in California is subject to that State's stringent reformulated gasoline standards, it is not necessary to include such gasoline, or applicable blendstocks used in the production of such gasoline, in EPA's blendstock tracking requirements beginning in 1995. Thus, the definitions of the volume of gasoline, "V_g" and "$V_{g,i}$," in the averaging period blendstock-to-gasoline ratio in § 80.102(d)(1)(i) and the running cumulative compliance period blendstock-to-gasoline ratio in § 80.102(d)(2)(i), respectively, are amended by adding an explicit exclusion for California gasoline. Similarly, an additional subparagraph (v) has been added under § 80.102(d)(3) to exclude applicable blendstocks used to produce California gasoline in the blendstock ratio calculations. These corrections are necessary to make clear that the volumes of California gasoline, and applicable blendstocks used to produce California gasoline are not part of the ratio calculations.[6]

3. Record Keeping Requirements (§ 80.104)

Under § 80.104(a)(2)(ix), refiners and importers are required to retain documents to demonstrate that blendstocks were transferred for other than gasoline blending purposes as a basis for excluding such blendstocks from tracking. There are various other bases specified in § 80.102(d)(3) for excluding blendstocks from tracking (e.g., exported, transferred as a feedstock) for which document support is not required in the final rule. EPA believes that the document support requirement should apply to all excluded blendstocks. Therefore, § 80.104(a)(2)(ix) is expanded to require the retention of documents which demonstrate any of the specified bases for the exclusion of blendstocks from blendstock tracking.

4. Reporting Requirements (§ 80.105)

Section 80.105(a)(2) in the final rule requires refiners and importers to report the overall volume of applicable blendstock produced or imported and transferred to others. This provision is being clarified to require separate reporting for those applicable blendstocks that are, and those that are not, excluded under § 80.102(d)(3).

C. Preamble

The preamble of the February 16, 1994, notice of final rulemaking contains two errors in the sections discussing reformulated gasoline and anti-dumping enforcement provisions. The following corrections should be noted for these sections of the preamble:

- On page 7759, in the second column, in the 12th and 13th lines of the second full paragraph, "(March 1, 1996, through February 29, 1996)" should read "(March 1, 1996, through February 28, 1998)."
- On page 7800, in the second column, in the 4th and 5th lines of the carryover paragraph, "section 211(k)(c) of the Act" should read "section 211(k) and (c) of the Act."

[6] The baseline blendstock-to-gasoline ratio does include both gasoline and blendstock produced for the California market. This baseline ratio nevertheless is a valid basis for comparison with the compliance period blendstock-to-gasoline ratios (that exclude California gasoline and blendstock) because the baseline ratio represents a refiner's or importer's actual 1990 gasoline and blendstock volumes.

V. Summer/Winter Season

Section 80.91 of the Reformulated Gasoline Final Rule (59 FR 7716) defines summer and winter data and sampling requirements as follows: paragraph (d)(1)(i)(A) states that "Data shall have been obtained for at least three months of the refiner's or importer's production of summer gasoline and at least three months of its production of winter gasoline." The regulation goes on to define a summer month as "any month during which the refiner produced any gasoline which met the federal summer gasoline volatility requirements. Winter shall be any month which could not be considered a summer month."

Several comments received by EPA since the rule was published indicate that this present definition severely restricts or eliminates the winter period in some cases, and inappropriately allocates winter data to the summer calculation. Further, the current rule inadvertently precludes the use of actual data in some calculations, even when such per batch actual data is available.

Considering that the goal of the baseline is to most accurately reflect actual 1990 gasoline composition, the rule will be modified to more correctly allocate parameter data. Provision will be made for the use of actual RVP data to define summer and winter gasoline. When such Method 1, per batch actual data is not available, summer and winter months will be redefined to better approximate the seasonal gasoline fuel parameter and emission values.

This modification to the reformulated gasoline regulation will satisfy several comments received since publication in the **Federal Register**. EPA will redefine summer and winter months, for use when Method 1 actual batch data is not available, as follows. A summer month will be redefined as any month during which more than 50 percent (by volume) of the gasoline produced by a refiner met the federal summer gasoline volatility requirements. Winter shall remain defined as any month which could not be considered a summer month. This will correct situations in which small quantities of summer volatility gasoline are produced early in the year. Originally, data from a month in which even small quantities of summer volatility fuel was produced was considered a summer month. With this modification, such months in which the majority of fuel was winter volatility would be correctly allocated as a winter data month.

Further, for any month for which both winter and summer gasoline were

produced, if actual RVP (Method 1) data are available, that data will be accurately divided between the summer and winter calculations, as appropriate. If such per batch data is not available, all data for that month would be considered either summer or winter, based on the production volumes.

When actual per batch data is used, for minimum data requirement purposes, a month is considered equivalent to 4 weeks of seasonal data. Therefore, 12 weeks of data sampling on summer volatility fuel satisfies the minimum three months of data collection required. If a refiner, such as the California refiners, still cannot provide three months of winter data, they may petition for less than minimum data, under the provisions outlined in § 80.91(d)(1)(C).

VI. Baseline Determination Adjustments

A. Work-In-Progress (WIP) Adjustment

The final reformulated gasoline rule provided criteria for allowing work-in-progress baseline adjustments (section 80.91(e)(5)). Work-in-progress (WIP) refers to one or more major capital changes or commitment(s) made by a refiner prior to or in 1990. A WIP adjustment allows a refiner to modify its baseline volume and fuel parameter values (which affect emissions) to account for the WIP. In order to obtain a WIP modification, a refiner must petition EPA and EPA must approve the petition.

As indicated in the preamble to the final rule, EPA believes that the criteria for a WIP adjustment should be fairly stringent, as the adjustment was intended only for those for whom a significant investment had already been made in order to comply with another government mandate. Additionally, a broad program of adjustments could indicate that EPA exceeded its equitable discretion under *Alabama Power*, as discussed in the Regulatory Impact Analysis (RIA) accompanying the final rule.

In the final rule, EPA required that a refiner meet each of three criteria in order to qualify for a WIP baseline adjustment. A fourth criterion was also required to minimize environmental harm due to WIP adjustments, via simple model parameter caps and emissions caps for both the simple and complex models.

Since promulgation of the final rule, EPA has re-evaluated this fourth criterion of the WIP provisions. EPA intended to allow WIP adjustments to relieve severe hardship where the adjustment did not allow emissions to increase significantly relative to the Clean Air Act baseline. The methods EPA chose to constrain WIP adjustments had inconsistent impacts depending on simple model or complex model use. The modification proposed in this Direct Final Rulemaking would ensure that the fuel parameter constraints on WIP adjustments under the simple model would be more consistent with the emissions performance constraints under the complex model. Specifically, WIP adjustments will be permitted to exceed the simple model parameter caps, but only to the extent the baseline still complies with the complex model emission caps. Without this change, a WIP adjustment would be more constrained in 1995 than would be the case in 1998, possibly requiring a refiner to make processing changes in 1995 that would not be necessary in 1998. While the emissions and parameter caps were set to minimize environmental harm due to the WIP (realizing that a WIP adjustment will actually increase baseline emissions relative to 1990) EPA believes this modification will increase compliance flexibility while maintaining the environmental goals of the program.

With regard to the effect of WIP adjustments on reformulated gasoline compliance, the simple model caps stated in the regulations apply to reformulated gasoline as well as to conventional gasoline. As stated in the final reformulated gasoline rule, when the simple model is used for compliance, the WIP-adjusted annual average baseline values for sulfur, olefins and T90 are the actual WIP-adjusted values of those parameters, provided they do not exceed the unadjusted baseline values or the simple model parameter caps given in section 80.91(e)(viii)(B). However, baseline parameters may now exceed these caps if the WIP adjusted baseline does not result in exhaust emissions of VOC, toxics, and NO_X which exceed the emission levels specified in § 80.91(e)(5)(vii)(B), namely 105% of the annual average statutory value.

Based on questions received since promulgation of the final rule, two changes in the language of the Work-In-Progress (WIP) provisions are made to section 80.91(e)(5) to further clarify certain aspects of the WIP adjustment not explicitly addressed in the final rule. The regulatory language dealing with the emissions and parameter caps is unclear as to whether the caps apply to the actual values or to the change in emissions or parameter values. In addition, there appeared to be some confusion over what was meant by "adjusted" baseline. Paragraphs 80.91(e)(5)(vi) and 80.91(e)(5)(vii) have been modified to clarify agency intent.

B. JP–4 Adjustment

In the final rule for reformulated gasoline, EPA allowed adjustments for specific extenuating circumstances. Baseline fuel parameters, volumes and emissions of a refinery can be adjusted due to the occurrence of specific extraordinary or extenuating circumstances which caused its 1990 gasoline production to be different than it would have been had the circumstance not occurred. However, the Agency's objective is not to establish a broad adjustment program. Allowable circumstances include unforeseen, unplanned downtime of at least 30 days of one or more gasoline blendstock producing units due to equipment failure or natural cause beyond the control of the refiner, or for non-annual maintenance (turnaround) downtime which occurred in 1990. These types of adjustments reflect instances where the 1990 baseline truly deviated from the otherwise expected baseline (historic and future), had the incident not occurred. EPA also expects that allowed adjustments will have minimal environmental impact while relieving a large regulatory burden.

In keeping with that policy objective, EPA promulgated provisions to permit baseline adjustments for certain refiners which produced JP–4 jet fuel in 1990, upon petition and approval. As discussed in the RIA for the reformulated gasoline final rule, EPA believes that it has authority to allow such adjustments due to the discretion afforded EPA by Congress. Additionally, *Alabama Power* v. *Costle*[7] gives EPA "case-by-case discretion" to grant variances or even dispensation from a rule where imposition of the requirement would result in minimal environmental benefit but would extremely burden a regulated party. Today's action changes two portions of the provisions for JP–4 adjustment: the multiple refinery requirement and the JP–4 to gasoline production ratio. In the final reformulated gasoline rule, JP–4 baseline adjustments are generally limited to single-refinery refiners because such refiners have no way to aggregate baselines[8] so as to reduce the combined burden of a JP–4 phaseout and the anti-dumping requirements on their operations. In some cases, if no

[7] *Alabama Power Company* v. *Costle*, 636 F.2d 323.357 (D.C. Cir 1979).

[8] A refiner with more than one refinery may determine an aggregate baseline, i.e., a conventional gasoline compliance baseline, which consists of the volume-weighted emissions or fuel parameters, as applicable, of two or more refineries.

relief were granted in this area, the viability of a refinery could be at stake.

1. Multiple-Refinery Requirement

The final reformulated gasoline rule also promulgated baseline adjustment provisions for multi-refinery refiners where each refinery produced JP–4 in 1990. This adjustment provision assumes that multi-refinery refiners are predominantly in the business of fuel production and thus possess the means to offset the refinery's JP–4 volume and associated fuel parameter increases with fuels volumes at other locations. The adjustment also assumes that refiners with multiple-refineries have process units offering various processing options which support an average (or typical) fuel production operation.

Today's action modifies the JP–4 baseline adjustment multiple refinery requirement. Every refinery of a multiple-refinery is no longer required to have produced JP–4. Such multi-refinery refiners are allowed to average their 1990 JP–4 production to 1990 gasoline production ratio across all of their refineries. However, all refineries of a multi-refiner must still meet the other two criteria specified for the JP–4 baseline adjustment in the reformulated gasoline final regulations. Specifically, only refiners that will not produce reformulated gasoline and that meet the 1990 JP–4 to gasoline production ratio are allowed to make a JP–4 baseline adjustment. The Agency is amending the requirement stipulating that each refinery of multiple-refineries produced JP–4 in 1990 because, essentially, the same environmental impact and economic hardship is expected regardless of whether a single refinery or all refineries of a multiple-refinery produced JP–4.

2. JP–4 Baseline Adjustment Ratio

The final reformulated gasoline rule promulgated baseline adjustment provisions which stipulate that 1990 JP–4 production must have constituted a specified portion of a refiner's 1990 fuel production in order for a significant enough burden to exist to justify permiting baseline adjustments. Additionally, a baseline is neither unrepresentative of 1990, nor incalculable, because of post-1990 changes in crude availability, fuel specifications, fuel markets, etc. EPA is permitting baseline adjustments for certain refiners which produced JP–4 jet fuel in 1990 because, as discussed in the Regulatory Impact Analysis for the reformulated gasoline final rule, EPA believes that it has a limited authority to allow such adjustments in certain extreme cases. The final reformulated gasoline regulations require that the ratio of the refinery's 1990 JP–4 production to its 1990 gasoline production equal or exceed 0.5.

Upon further evaluation of the baseline adjustment provisions, the Agency has concluded that the JP–4 to gasoline production ratio, as promulgated in the RFG final rule (0.5), is unnecessarily restrictive. Based on responses from affected refiners, under the December 1993 criteria only two refiners in the United States would likely qualify for the adjustment. In other words, very few refiners under contract to produce JP–4 will have the relief intended by the provision. Today's action alters the refiner's 1990 JP–4 production to 1990 gasoline production ratio from 0.5 to 0.2. EPA believes this revised ratio indicates that a significant amount of the refinery feedstock used for JP–4 production would have to be converted in order to produce gasoline. Altering the JP–4 to gasoline production ratio will allow additional small refiners to qualify for the adjustment and not be forced to operate from a drastically less competitive position or be driven out of business. Based on feedback EPA has received, changing the ratio from 0.5 to 0.2 raises the number of affected refiners from 2 to 6. If large refineries had such a ratio also, the regulatory burden would be just as great. Also, it would be more difficult to argue de minimis environmental impact for large refiners. In reality none do, such that the ratio is only an issue for small refiners.

Several different ratio options were suggested by commenters during the reformulated gasoline rulemaking as to what minimum portion of a refinery's 1990 production JP–4 should have constituted for the circumstance to be extenuating, as follows: JP–4 production to total refinery production, 20%; JP–4 production to gasoline production, 5%; JP–4 production to gasoline production, 75%; and, JP–4 production to gasoline plus JP–4 production, 10%. EPA's 0.2 JP–4 to gasoline ratio is in line with some of the commenters suggestions.

At less than a 1990 JP–4 to gasoline production ratio of 0.2, EPA believes the impact on benzene and aromatics may make it more costly for refiners to comply with the regulations, though it is unlikely that such refiners will be forced out of business or experience some similar extreme burden. For example, it is expected that no economic hardship will occur at a JP–4 to gasoline ratio of 0.1. Thus, the Agency discretion recognized in *Alabama*[9] to grant variances or even dispensation from a rule where imposition of the requirement would result in minimal environmental benefit but would extremely burden a regulated party, would not apply.

While the adjusted emission baselines of those approved for both amended JP–4 adjustments are likely to be higher than their actual 1990 baselines (primarily due to increased benzene and aromatics) EPA expects minimal negative environmental affects. First, the number of refineries meeting the criteria is still expected to be quite small. Second, the total production of all such refineries is also small. Thus, not very much additional gasoline will be affected by any baseline adjustments for JP–4 than if the criteria were less stringent or adjustments were not allowed at all. The modification of the multi-refinery requirement and the reduction of the ratio requirement to 0.2 both provide necessary flexibility to refiners and allow additional refiners (that are simultaneously burdened by the JP–4 phaseout and the anti-dumping provisions) regulatory relief.

As stated in the Regulatory Impact Analysis (RIA) for the reformulated gasoline final rule, JP–4 baseline adjustments will be allowed only for those refiners which will not produce reformulated gasoline, which is the most critical factor in assessing environmental impact. While the anti-dumping requirements, in general, apply to all conventional gasoline whether or not reformulated gasoline is also produced, in these specific cases no dumping will occur due to reformulated gasoline production. The intent of Congress with regard to the anti-dumping program will be met while not unduly burdening those that meet the specified criteria. Since both the unadjusted and adjusted baselines must be determined, if a refiner granted such an adjustment subsequently produces reformulated gasoline, its conventional gasoline compliance would immediately be subject to its original unadjusted baseline.

VII. Public Participation and Effective Date

The Agency is publishing this action as a direct final rule because it views the changes contained within as non-controversial and anticipates no adverse or critical comments. This action will be effective September 19, 1994 unless the Agency receives notice by August 19, 1994 that adverse or critical comments will be submitted, or that a party

[9] *Alabama Power Company* vs. *Costle*, 636 F.2d 323.357 (D.C. Cir 1979).

requests the opportunity to submit such oral comments pursuant to section 307(d)(5) of the Clean Air Act, as amended. If such notice is received regarding a change to a particular regulatory provision, the provision in question will be withdrawn before the effective date by publishing a subsequent **Federal Register** notice withdrawing the direct final rule for the identified provision.

Parties that submit adverse or critical comments, notify EPA of intentions to submit such comments, or request a public hearing within the allotted time period should identify the specific provision(s) at issue by specifying the preamble section numbers that discuss the provision(s). For instance, comments on the change to the oxygen valid range limits should include a reference to Section (Item Number) II.A.1 of the preamble. Comments on any of the insubstantial errors in Section I of the preamble should include a reference to the identification code associated with each change in that section. For instance, adverse comments on the paragraph reference change in § 80.41(h)(2)(iii) should include a reference to Item Number I–A.

The EPA will withdraw from final action only those specific provision(s) identified by the commenters or persons who notify EPA of their intent to comment or who request an opportunity to submit oral comments. All provisions in today's action that are not commented upon or for which EPA does not receive notice as described above will become effective September 19, 1994.

VIII. Statutory Authority

The statutory authority for the actions finalized today is granted to EPA by Sections 114, 211 (c) and (k) and 301 of the Clean Air Act, as amended; 42 U.S.C. 7414, 7545 (c) and (k), and 7601.

IX. Administrative Designation

Pursuant to Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this direct rule is not a "significant regulatory action".

X. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) of 1980 requires federal agencies to examine the effects of the renewable oxygenate regulation and to identify significant adverse impacts of federal regulations on a substantial number of small entities. Because the RFA does not provide concrete definitions of "small entity," "significant impact," or "substantial number," EPA has established guidelines setting the standards to be used in evaluating impacts on small businesses.[10] For purposes of the renewable oxygenate requirement for reformulated gasoline, a small entity is any business which is independently owned and operated and not dominant in its field as defined by SBA regulations under section 3 of the Small Business Act.

The Agency believes that the interpretations, clarifications, and corrections published in today's final action are unlikely to have a significant economic impact on a substantial number of small entities. In fact, the revisions contained herein are designed to promote successful implementation of the reformulated gasoline program for all regulated parties.

List of Subjects in 40 CFR Part 80

Environmental protection, Air pollution control, Fuel additives, Gasoline, and Motor vehicle pollution.

Dated: June 27, 1994.

Carol M. Browner,

Administrator.

40 CFR part 80 is amended as follows:

[10] U.S. Environmental Protection Agency, Memorandum to Assistant Administrators, "Compliance with the Regulatory Flexibility Act," EPA Office of Policy, Planning, and Evaluation, 1984. In addition, U.S. Environmental Protection Agency, Memorandum to Assistant Administrators, "Agency's Revised Guidelines for Implementing the Regulatory Flexibility Act," Office of Policy, Planning, and Evaluation, 1992.

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: Sections 114, 211 and 301(a) of the Clean Air Act as amended (42 U.S.C. 7414, 7545 and 7601(a)).

2. In § 80.41, paragraphs (h)(2)(iii), (j)(2), and the introductory text to paragraph (m)(1) are revised to read as follows:

§ 80.41 Standards and requirements for compliance.

* * * * *

(h) * * *

(2) * * *

(iii) In the case of a refiner that operates more than one refinery, the standards specified under this paragraph (h)(2) shall be met using the refinery grouping selected by the refiner under § 80.101(h).

* * * * *

(j) * * *

(2) The aromatics value which, together with the values for benzene, RVP, and oxygen determined under paragraph (j)(1) of this section, meets the Simple Model toxics requirement specified in paragraphs (a) or (b) of this section, as applicable;

* * * * *

(m) * * *

(1) On each occasion that a covered area fails a NO_X emissions reduction survey conducted pursuant to § 80.68, except in the case of Phase II complex model NO_X standards for VOC-controlled gasoline, the NO_X emissions reduction requirements for that covered area beginning in the year following the failure shall be adjusted to be more stringent as follows:

* * * * *

3. Section 80.42 is amended by revising definitions "EXHVOCS1" through "REFVOCS2" in paragraph (a) introductory text; by adding a concluding sentence to paragraphs (b)(1)(ii), (b)(2)(ii), and (b)(3)(ii), and adding paragraph (b)(4); and by revising the table in paragraph (c)(1) to read as follows:

§ 80.42 Simple emissions model.

(a) * * *

EXHVOCS1=Exhaust nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, for VOC control region 1 during the summer period.

EXHVOCS2=Exhaust nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, for VOC control region 2 during the summer period.

EXHVOCW=Exhaust nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, during the winter period.
EVPVOCS1=Evaporative nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, for VOC control region 1 during the summer period.
EVPVOCS2=Evaporative nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, for VOC control region 2 during the summer period.
RLVOCS1=Running loss nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, for VOC control region 1 during the summer period.
RLVOCS2=Running loss nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, for VOC control region 2 during the summer period.
REFVOCS1=Refueling nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, for VOC control region 1 during the summer period.
REFVOCS2=Refueling nonmethane, nonethane VOC emissions from the fuel in question, in grams per mile, for VOC control region 2 during the summer period.

* * * * *

(b) * * *
(1) * * *
(ii) * * * Oxygen in the form of methanol or non-alcohol, non-ether oxygenates shall not be evaluated with the Simple Model, but instead must be evaluated through vehicle testing under the Complex Model per § 80.48.

* * * * *

(2) * * *
(ii) * * * Oxygen in the form of methanol or non-alcohol, non-ether oxygenates shall not be evaluated with the Simple Model, but instead must be evaluated through vehicle testing under the Complex Model per § 80.48.

* * * * *

(3) * * *
(ii) * * * Oxygen in the form of methanol or non-alcohol, non-ether oxygenates shall not be evaluated with the Simple Model, but instead must be evaluated through vehicle testing under the Complex Model per § 80.48.

(4) If the fuel aromatics content of the fuel in question is less than 10 volume percent, then an FAROM value of 10 volume percent shall be used when evaluating the toxics emissions equations given in paragraphs (b)(1), (b)(2), and (b)(3) of this section.

(c) * * *
(1) * * *

Fuel parameter	Range
Benzene content	0–4.9 vol %.
RVP	6.4–9.0 psi.
Oxygen content	0–4.0 wt %.
Aromatics content	0–55 vol %.

* * * * *

4. Section 80.45 is amended by:
a. revising Table 3 in paragraph (b)(3);
b. revising Table 6 in (c)(1)(iv)(A);
c. revising the first sentence and the equations for Phase I and II in paragraph (c)(1)(iv)(B), and revising (c)(1)(iv)(C)*(5)*;
d. revising the second sentence in paragraph (c)(1)(iv)(C)*(9)*;
e. revising paragraphs (c)(1)(iv)(C)*(11)* and *(12)*;
f. revising the first sentence in paragraph (c)(1)(iv)(C)*(13)* and revising paragraph (c)(1)(iv)(C)*(14)*;
g. revising paragraph (c)(1)(iv)(D)*(5)*, revising the second sentence in paragraph (c)(1)(iv)(D)*(9)*, and revising paragraphs (c)(1)(iv)(D)*(11)* and *(12)*;
h. revising the first sentence in paragraph (c)(1)(iv)(D)*(13)*, and revising paragraph (c)(1)(iv)(D)*(14)*;
i. revising the equation for VOCRL1 in paragraph (c)(3)(i);
j. revising the equations for VOCHS1 and VOCRF1 in paragraph (c)(3)(ii);
k. revising the equation for VOCRL2 in paragraph (c)(4)(ii), and revising paragraph (c)(8)(ii);
l. revising paragraph (d)(1)(iv)(A) and Table 7, revising the first sentence and the equations for Phase I and II in paragraph (d)(1)(iv)(B), revising paragraph (d)(1)(iv)(C)*(5)*, and revising the second sentence in paragraph (d)(1)(iv)(C)*(9)*;
m. revising the Phase I equation for "Toxics 2%" and the Phase II equation for "Toxics 1%" in paragraph (e)(1)(ii);
n. revising paragraph (e)(3) introductory text and removing paragraphs (e)(3)(i) and (e)(3)(ii);
o. revising the last sentence in paragraph (e)(4)(iii);
p. adding a concluding sentence to paragraphs (e)(5)(iv) and (e)(6)(iv);
q. revising equations "HSBZ1" through "RFBZ1" in paragraph (e)(9) and equations "HSBZ2" through "RFBZ2" in paragraph (e)(10); and
r. revising paragraph (f)(1).

The additions and revisions are set out to read as follows:

§ 80.45 Complex emissions model.

* * * * *

(b) * * *
(3) * * *

TABLE 3.—BASELINE EXHAUST EMISSIONS

Exhaust pollutant	Phase I		Phase II	
	Summer (mg/mile)	Winter (mg/mile)	Summer (mg/mile)	Winter (mg/mile)
VOC	446.0	660.0	907.0	1341.0
NO_x	660.0	750.0	1340.0	1540.0
Benzene	26.10	37.57	53.54	77.62
Acetaldehyde	2.19	3.57	4.44	7.25
Formaldehyde	4.85	7.73	9.70	15.34
1,3-Butadiene	4.31	7.27	9.38	15.84
POM	1.50	2.21	3.04	4.50

* * * * *

(c) * * *

(1) * * *
(iv) * * *

(A) * * *

TABLE 6.—ALLOWABLE RANGES OF E200, E300, AND ARO FOR THE EXHAUST VOC EQUATIONS IN PARAGRAPHS (c)(1)(i) and (ii) OF THIS SECTION

Fuel parameter	Phase I		Phase II	
	Lower limit	Higher limit	Lower limit	Higher limit
E200	33.00	65.83	33.00	65.52
E300	72.00	Variable[1]	72.00	Variable[2]
ARO	18.00	46.00	18.00	46.00

[1] Higher E300 limit=lower of 94.0 or 80.32+[0.390×(ARO)].
[2] Higher E300 limit=lower of 94.0 or 79.75+[0.385×(ARO)].

(B) For fuels with E200, E300, and/or ARO levels outside the ranges defined in Table 6, $Y_{VOC}(t)$ shall be defined as:
For Phase I:

$$Y_{VOC}(t)=100\%\times0.52\times[\exp(v_1(et))/\exp(v1(b))-1]+100\%\times0.48\times[\exp(v_2(et))/\exp(v_2(b))-1]+\{100\%-0.52\times[\exp(v_1(et))/\exp(v_1(b))]\times\{[(0.0002144\times E200_{et})-0.014470]\times\Delta E200\}+\{[(0.0008174\times E300_{et})-0.068624-(0.000348\times ARO_{et})]\times\Delta E300\}+\{[(-0.000348\times E300_{et})+0.0323712]\times\Delta ARO\}]\}+\{100\%\times0.48\times[\exp(v_2(et))/\exp(v2(b))]\times[\{[(0.000212\times E200_{et})-0.01350]\times\Delta E200\}+\{[(0.000816\times E300_{et})-0.06233-(0.00029\times ARO_{et})]\times\Delta E300\}+\{[(-0.00029\times E300_{et})+0.028204]\times\Delta ARO\}]\}$$

For Phase II:

$$Y_{VOC}(t)=100\%\times0.444\times[\exp(v_1(et))/\exp(v_1(b))-1]+100\%\times0.556\times[\exp(v_2(et))/\exp(v_2(b))-1]+\{100\%\times0.444\times[\exp(v_1(et))/\exp(v_1(b))]\times[\{[(0.0002144\times E200_{et})-0.014470]\times\Delta E200\}+\{[(0.0008174\times E300_{et})-0.068624-(0.000348\times ARO_{et})]\times\Delta E300\}+\{[(-0.000348\times E300_{et})+0.0323712]\times\Delta ARO\}]\}+\{100\%\times0.556\times[\exp(v_2(et))/\exp(v_2(b))]\times[\{[(0.000212\times E200_{et})-0.01350]]\times\Delta E200\}+\{[(0.000816\times E300_{et})-0.06233-(0.00029\times ARO_{et})]\times\Delta E300\}+\{[(-0.00029\times E300_{et})+0.028204]\times\Delta ARO\}]\}$$

* * * * *

(C) * * *

(5) If the E300 level of the target fuel is greater than 95 volume percent, then the E300 value of the target fuel shall be set equal to 95 volume percent for the purposes of calculating VOC emissions with the Phase I equation given in paragraph (c)(1)(iv)(B) of this section.

* * * * *

(9) * * * If the aromatics level of the target fuel is less than 10 volume percent, then ΔARO shall be set equal to −8 volume percent.

* * * * *

(11) If neither of the conditions established in paragraphs (c)(1)(iv)(C)*(9)* and *(10)* of this section are met, then ΔARO shall be set equal to zero.

(12) If the E300 level of the target fuel is less than 72 percent, then ΔE300 shall be set equal to (E300 − 72 percent).

(13) If the E300 level of the target fuel is greater than 94 volume percent and [80.32+(0.390×ARO)] also is greater than 94, then ΔE300 shall be set equal to (E300 − 94 volume percent).* * *

(14) If neither of the conditions established in paragraphs (c)(1)(iv)(C)*(12)* and *(13)* of this section are met, then ΔE300 shall be set equal to zero.

(D) * * *

(5) If the E300 level of the target fuel is greater than 95 volume percent, then the E300 value of the target fuel shall be set equal to 95 volume percent for the purposes of calculating VOC emissions with the Phase II equation given in paragraph (c)(1)(iv)(B) of this section.

* * * * *

(9) * * * If the aromatics level of the target fuel is less than 10 volume percent, then ΔARO shall be set equal to −8 volume percent.

* * * * *

(11) If neither of the conditions established in paragraphs (c)(1)(iv)(D)(9) and (10) of this section are met, then ΔARO shall be set equal to zero.

(12) If the E300 level of the target fuel is less than 72 percent, then ΔE300 shall be set equal to (E300)×72 percent).

(13) If the E300 level of the target fuel is greater than 94 volume percent and [80.32+(0.390×ARO)] also is greater than 94, then ΔE300 shall be set equal to (E300 − 94 volume percent). * * *

(14) If neither of the conditions established in paragraphs (c)(1)(iv)(D)(12) and (13) of this section are met, then ΔE300 shall be set equal to zero.

* * * * *

(3) * * *

(i) * * *

$$VOCRL1=[0.00279\times(RVP^2)]+[0.1096\times RVP]-0.7340$$

* * * * *

(ii) * * *

$$VOCHS1=[0.006654\times(RVP^2)]-[0.08094\times RVP]+0.2846$$

* * * * *

$$VOCRF1=[0.004767\times RVP]+0.011859$$

(4) * * *

(ii) * * *

$$VOCRL2=[0.016169\times(RVP^2)]-[0.17206\times RVP]+0.56724$$

* * * * *

(8) * * *

(ii) The total winter VOC emissions performance of the target fuel in percentage terms from baseline levels shall be given by the following equation during Phase II:

$$VOCW\%=[100\%\times(VOC-1.341\ g/mi)]/(1.341\ g/mi)$$

(d) * * *

(1) * * *

(iv) * * *

(A) The equations in paragraphs (d)(1)(i) and (ii) of this section shall be used within the allowable range of SUL, OLE, and ARO for the appropriate Phase, as defined in the following Table 7:

TABLE 7.—ALLOWABLE RANGES OF SUL, OLE, AND ARO FOR THE NO_X EQUATIONS IN PARAGRAPHS/(d)(1)(i) AND (ii) OF THIS SECTION

Fuel parameter	Phase I		Phase II	
	Low end	High end	Low end	High end
SUL	10.0	450.0	10.0	450.0
OLE	3.77	19.0	3.77	19.0
ARO	18.0	36.2	18.0	36.8

(B) For fuels with SUL, OLE, and/or ARO levels outside the ranges defined in Table 7 of paragraph (d)(2)(iv)(A) of this section, $Y_{NOX}(t)$ shall be defined as:
For Phase I:

$$Y_{NOX}(t)=100\%\times0.82\times[\exp(n_1(et))/\exp(n_1(b))-1]+100\%\times0.18\times[\exp(n_2(et))/\exp(n_2(b))-1]$$

$$+\{100\% \times 0.82 \times [\exp(n_1(et))/\exp(n_1(b))] \times [\{[(0.00000133 \times SUL_{et}) + 0.000692] \times \Delta SUL\} + \{[(-0.000238 \times ARO_{et}) + 0.0083632] \times \Delta ARO\} + \{[(0.000733 \times OLE_{et}) - 0.002774] \times \Delta OLE\}]\}$$

$$+\{100\% \times 0.18 \times [\exp(n_2(et))/\exp(n_2(b))] \times [\{0.000252 \times \Delta\Sigma\Theta\Lambda\} + \{[(-0.0001599 \times ARO\epsilon\tau) + 0.007097] \times \Delta ARO\} + \{[(0.000732 \times OLE_{et}) - 0.00276] \times \Delta OLE\}]\}$$

For Phase II:

$$Y_{nox}(t) = 100\% \times 0.738 \times [\exp(n_1(et))/\exp(n_1(b)) - 1] + 100\% \times 0.262 \times [\exp(n_2(et))/\exp(n_2(b)) - 1] + \{100\% \times 0.738 \times [\exp(n_1(et))/\exp(n_1(b))] \times [\{[(-0.00000133 \times SUL_{et}) + 0.000692] \times \Delta SUL\} + \{[(-0.000238 \times ARO_{et}) + 0.0083632] \times \Delta ARO\} + \{[(0.000733 \times OLE_{et}) - 0.002774] \times \Delta OLE\}]\} + \{100\% \times 0.262 \times [\exp(n_2(et))/\exp(n_2(b))] \times [\{0.000252 \times \Delta SUL\} + \{[(-0.0001599 \times ARO_{et}) + 0.007097] \times \Delta ARO\} + \{[(0.000732 \times OLE_{et}) - 0.00276] \times \Delta OLE\}]\}$$

* * * * *

(C) * * *

(5) If the E300 level of the target fuel is greater than 95 volume percent, then the E300 value of the target fuel shall be set equal to 95 volume percent for the purposes of calculating NO_X emissions with the equations given in paragraph (d)(1)(iv)(B) of this section.

* * * * *

(9) * * * If the aromatics level of the target fuel is less than 10 volume percent, then ΔARO shall be set equal to −8 volume percent.

* * * * *

(e) * * *

(1) * * *

(ii) * * *

$$TOXICS2\% = [100\% \times (TOXICS2 - 47.58\ mg/mi)] / (47.58\ mg/mi)$$

* * * * *

$$TOXICS1\% = [100\% \times (TOXICS1 - 86.34\ mg/mi)] / (86.34\ mg/mi)$$

* * * * *

(3) The year-round toxics performance in VOC Control Regions 1 and 2 shall be derived from volume-weighted performances of individual batches of fuel as described in § 80.67(g).

(4) * * *

(iii) * * * If the E300 value of the target fuel is greater than 95 volume percent, then an E300 value of 95 volume percent shall be used when evaluating the equations in paragraphs (e)(4)(i) and (ii) of this section.

(5) * * *

(iv) * * * Oxygen in the form of methanol or non-alcohol, non-ether oxygenates shall not be evaluated with the Complex Model, but instead must be evaluated through vehicle testing per § 80.48.

(6) * * *

(iv) * * * Oxygen in the form of methanol or non-alcohol, non-ether oxygenates shall not be evaluated with the Complex Model, but instead must be evaluated through vehicle testing per § 80.48.

* * * * *

(9) * * *

$$HSBZ1 = 10 \times BEN \times VOCHS1 \times [(-0.0342 \times MTB) + (-0.080274 \times RVP) + 1.4448]$$

$$DIBZ1 = 10 \times BEN \times VOCD11 \times [(-0.0290 \times MTB) + (-0.080274 \times RVP) + 1.3758]$$

$$RLBZ1 = 10 \times BEN \times VOCRL1 \times [(-0.0342 \times MTB) + (-0.080274 \times RVP) + 1.4448]$$

$$RFBZ1 = 10 \times BEN \times VOCRF1 \times [(-0.0296 \times MTB) + (-0.081507 \times RVP) + 1.3972$$

* * * * *

(10) * * *

$$HSBZ2 = 10 \times BEN \times VOCHS2 \times [(-0.0342 \times MTB) + (-0.080274 \times RVP) + 1.4448]$$

$$DIBZ2 = 10 \times BEN \times VOCD12 \times [(-0.0290 \times MTB) + (-0.080274 \times RVP) + 1.3758]$$

$$RLBZ2 = 10 \times BEN \times VOCRL2 \times [(-0.0342 \times MTB) + (-0.080274 \times RVP) + 1.4448]$$

$$RFBZ2 = 10 \times BEN \times VOCRF2 \times [(-0.0296 \times MTB) + (-0.081507 \times RVP) + 1.3972$$

* * * * *

(f) * * *

(1) The equations described in paragraphs (c), (d), and (e) of this section shall be valid only for fuels with fuel properties that fall in the following ranges for reformulated gasolines and conventional gasolines:

(i) For reformulated gasolines:

Fuel property	Acceptable range
Oxygen	0.0–4.0 weight percent.
Sulfur	0.0–500.0 parts per million by weight.
RVP	6.4–10.0 pounds per square inch.
E200	30.0–70.0 percent evaporated.
E300	70.0–100.0 percent evaporated.
Aromatics	0.0–50.0 volume percent.
Olefins	0.0–25.0 volume percent.
Benzene	0.0–2.0 volume percent.

For conventional gasoline:

Fuel property	Acceptable range
Oxygen	0.0–4.0 weight percent.
Sulfur	0.0–1000.0 parts per million by weight.
RVP	6.4–11.0 pounds per square inch.
E200	30.0–70.0 percent evaporated.
E300	70.0–100.0 percent evaporated.
Aromatics	0.0–550 volume percent.
Olefins	0.0–30.0 volume percent.
Benzene	0.0–4.9 volume percent.

* * * * *

5. Section 80.46 is amended by revising the table in paragraph (f)(1)(ii)(K) to read as follows:

§ 80.46 Measurement of reformulated gasoline fuel parameters.

* * * * *

(f) * * *

(1) * * *

(ii) * * *

(K) * * *

Compound	Concentration (percent)	CAS No.	AMU	Retention time	Boiling point, °C
Benzene	2.25 vol	71–43–2	78	18.9 min	80.1
Methylbenzene	10.0 vol	108–88–3	91	25.5 min	111
Ethylbenzene	5.0 vol	100–41–4	91	34.1 min	136.2
1,3-Dimethylbenzene	5 vol	108–38–3	91	35.1 min	136–138
1,4-Dimethylbenzene		106–42–3			
1,2-dimethylbenzene	10 vol	95–47–6	91	38.1 min	144
(1-methylethyl)-benzene	2.25 vol	98–82–8	105	42.8 min	
Propylbenzene	2.25 vol	103–65–1	91	48.0 min	159.2
1-ethyl-2-methylbenzene	2.25 vol	611–14–3	105	49.3 min	165
1,2,4-trimethylbenzene	2.25 vol	95–63–6	105	50.9 min	169
1,2,3-trimethylbenzene	2.25 vol	526–73–8	105	53.3 min	

Compound	Concentration (percent)	CAS No.	AMU	Retention time	Boiling point, °C
1,3-diethylbenzene	2.25 vol	141-93-5	119	56.6 min	181
Butylbenzene	2.25 vol	104-51-8	91	60.7 min	183
o-Cymene	2.25 vol	527-84-4	119	63.9 min	
1-ethyl-3-methylbenzene	2.25 vol	620-14-4	105	64.2 min	
m-Cymene	2.25 vol	535-77-3	119	69.0 min	
p-Cymene	2.25 vol	99-87-6	119	73.0 min	
Isobutylbenzene	2.25 vol	538-93-2	91	75.0 min	
Indan	2.25 vol	496-11-7	117	50.0 min	
1-methyl-3-propylbenzene	2.25 vol	1074-43-7	105	78.9 min	
2-ethyl-1,4-dimethylbenzene	2.25 vol	1758-88-9	119	83.2 min	187
1,2,4,5-tetramethylbenzene	2.25 vol	95-93-2	119	83.4 min	
1-ethyl-2,4-dimethylbenzene	2.25 vol	874-41-9	119	85.7 min	
(1,1-dimethylethyl)-3-methylbenzene	2.25 vol	27138-21-2	133	87.3 min	
1-ethyl-2,3-dimethylbenzene	2.25 vol	933-98-2	119	88.7 min	
1-ethyl-1,4-dimethylbenzene	2.25 vol	874-41-9	119	94.9 min	
2-ethyl-1,3-dimethylbenzene	2.25 vol	2870-04-4	119	100.9 min	
1-ethyl-3,5-dimethylbenzene	2.25 vol	934-74-7	119	102.5 min	
1,2,3,5-tetramethylbenzene	2.25 vol	527-53-7	119	115.9 min	
Pentylbenzene	2.25 vol	538-68-1	91	116 min	
Naphthalene	2.25 vol	191-20-3	128	118.4 min	198
3,5-dimethyl-t-butylbenzene	2.25 vol	98-19-1	147	118.5 min	205.3
1-methylnaphthalene	2.25 vol	90-12-0	142	129.0 min	
2-methylnaphthalene	2.25 vol	91-57-6	142	131.0 min	

* * * * *

6. In § 80.48, paragraph (c)(1) introductory text is revised, the last sentence in paragraph (c)(1)(v) is revised, a concluding sentence is added to paragraph (c)(2)(iii), and paragraph (g) is revised to read as follows:

§ 80.48 Augmentation of the complex emission model by vehicle testing.

* * * * *

(c) * * *

(1) The analysis shall fit a regression model to the natural logarithm of emissions measured from addition fuels 1, 2, and 3 only (as specified at § 80.49(a) and adjusted as per paragraph (c)(1)(iv) of this section and § 80.49(d)) that includes the following terms:

* * * * *

(v) * * * If, after dropping the B_i term and re-estimating the model, the A_i term does not satisfy these criteria, then both terms shall be dropped, all test data shall be reported to EPA, and the augmentation request shall be denied.

(2) * * *

(iii) * * * The Administrator shall make available upon request existing complex model terms and coefficients in centered form.

* * * * *

(g) EPA reserves the right to analyze the data generated during vehicle testing, to use such analyses to determine the validity of other augmentation petitions, and to use such data to update the complex model for use in certifying all reformulated gasolines.

* * * * *

7. In § 80.49, the table in paragraph (a)(5)(i) is revised, and paragraph (b)(3)(iii) is revised to read as follows:

§ 80.49 Fuels to be used in augmenting the complex emission model through vehicle testing.

(a) * * *

(5) * * *

(i) * * *

Fuel parameter	Measurement uncertainty
API gravity	± 0.2 °API
Sulfur content	± 10 ppm
Benzene content.	± 0.02 vol %
RVP	± 0.05 psi
Octane	± 0.2 (R+M/2)
E200 level	± 2 %
E300 level	± 2 %
Oxygenate content.	± 0.2 vol %
Aromatics content.	± 0.5 vol %
Olefins content	± 0.3 vol %
Saturates content.	± 1.0 vol %
Detergent control Additives.	± 2% of the level required by EPA's detergents rule.

* * * * *

(b) * * *

(3) * * *

(iii) All other parameters shall be present at the levels specified in paragraph (b)(2)(ii) of this section.

* * * * *

8. In § 80.59, the last sentence in paragraph (a) is revised to read as follows:

§ 80.59 General test fleet requirements for vehicle testing.

(a) * * * To be technologically equivalent vehicles at minimum must have closed-loop systems and possess adaptive learning.

* * * * *

9. Section 80.65 is amended by revising paragraphs (d)(2)(iii), (d)(2)(v)(B), (d)(2)(vi), (d)(3), the third sentence of (e)(1), the table in (e)(2)(i), paragraph (e)(2)(ii)(A), (f)(4) introductory text, and paragraph (h) to read as follows:

§ 80.65 General requirements for refiners, importers, and oxygenate blenders.

* * * * *

(d) * * *

(2) * * *

(iii) Reformulated gasoline (but not RBOB) must be designated either as oxygenated fuels program reformulated gasoline, or not oxygenated fuels program reformulated gasoline.

(A) Gasoline must be designated as oxygenated fuels program reformulated gasoline if such gasoline:

(1) Has an oxygen content that is greater than or equal to 2.0 weight percent; and

(2) Arrives at a terminal from which gasoline is dispensed into trucks used to deliver gasoline to an oxygenated fuels control area within five days prior to the beginning of the oxygenated fuels control period for that control area.

(B) Gasoline may be designated as oxygenated fuels program reformulated gasoline if such gasoline has an oxygen content that is greater than or equal to 2.0 weight percent, regardless of whether the gasoline is intended for use

in any oxygenated fuels program control area during an oxygenated fuels program control period.

* * * * *

(v) * * *

(B) NO_X emissions performance in the case of gasoline certified using the complex model.

* * * * *

(vi) In the case of RBOB, as RBOB suitable for blending with:

(A) Any oxygenate;

(B) Ether only; or

(C) Other specified oxygenate type(s) and amount(s).

(3) Every batch of reformulated or conventional gasoline or RBOB produced or imported at each refinery or import facility, or each batch of blendstock produced and sold or transferred if blendstock accounting is required under § 80.102(e), shall be assigned a number (the "batch number"), consisting of the EPA-assigned refiner, importer or oxygenate blender registration number, the EPA-assigned facility registration number, the last two digits of the year in which the batch was produced, and a unique number for the batch, beginning with the number one for the first batch produced or imported each calendar year and each subsequent batch during the calendar year being assigned the next sequential number (e.g., 4321-54321-95-000001, 4321-54321-95-000002, etc.).

* * * * *

(e) * * *

(1) * * * A batch of simple model reformulated gasoline may be released by the refiner or importer prior to the receipt of the refiner's or importer's test results except for test results for oxygen and benzene, and RVP in the case of VOC-controlled gasoline.

(2) * * *

(i) * * *

Fuel property	Range
Sulfur content	25 ppm
Aromatics content	2.7 vol %
Olefins content	2.5 vol %
Benzene content	0.21 vol %
Ethanol content	0.4 vol %
Methanol content	0.2 vol %
MTBE (and other methyl ethers) content.	0.6 vol %
ETBE (and other ethyl ethers) content.	0.6 vol %
TAME	0.6 vol %
t-Butanol content	0.6 vol %
RVP	0.3 psi
50% distillation (T50)	5 °F
90% distillation (T90)	5 °F
E200	2.5 vol %
E300	3.5 vol %
API Gravity	0.3 °API

(ii) * * *

(A) The larger of the two values for the property, except the smaller of the two results shall be used for oxygenates; or

* * * * *

(f) * * *

(4) Any refiner that produces reformulated gasoline using computer-controlled in-line blending equipment is exempt from the independent sampling and testing requirements specified in paragraphs (f)(1) through (3) of this section and from the requirement of paragraph (e)(1) of this section to obtain test results for each batch prior to the gasoline leaving the refinery, provided that such refiner:

* * * * *

(h) *Compliance audits.* Any refiner and importer of any reformulated gasoline or RBOB, and any oxygenate blender of any RBOB who meets the oxygen standard on average, shall have the reformulated gasoline and RBOB it produced, imported, or blended during each calendar year audited for compliance with the requirements of this subpart D, in accordance with the requirements of subpart F, at the conclusion of each calendar year.

* * * * *

10. Section 80.66 is amended by revising paragraphs (g)(1) and (g)(2)(ii) to read as follows:

§ 80.66 Calculation of reformulated gasoline properties.

* * * * *

(g)(1) Per gallon values for VOC and NO_X emissions reduction shall be calculated using the methodology specified in § 80.45 that is appropriate for the gasoline.

(2) * * *

(ii) For gasoline subject to the complex model, the methodology specified in § 80.45 that is appropriate for the gasoline.

* * * * *

11. Section 80.68 is amended by:

a. revising paragraphs (c)(8)(ii)(A), (c)(9)(ii)(A), (c)(9)(ii)(B), (c)(10)(i);

b. redesignating paragraph (c)(12) as paragraph (c)(13), and removing the first two sentences in the newly redesignated (c)(13) introductory text;

c. by adding a new paragraph (c)(12); and

d. revising paragraphs (c)(13)(v)(G), (H) and (L).

The additions and revisions are set out to read as follows:

§ 80.68 Compliance surveys.

* * * * *

(c) * * *

(8) * * *

(ii) * * *

(A) For each complex model sample from the survey series, the VOC emissions reduction percentage shall be determined based upon the tested parameter values for that sample and the appropriate methodology for calculating VOC emissions reduction at § 80.45;

* * * * *

(9) * * *

(ii) * * *

(A) For each complex model sample from the survey series, the toxics emissions reduction percentage shall be determined based upon the tested parameter values for that sample and the appropriate methodology for calculating toxics emissions reduction at § 80.45;

(B) The annual average of the toxics emissions reduction percentages for all samples from a survey series shall be calculated according to the formula specified in paragraph (c)(9)(i)(B) of this section; and

* * * * *

(10) * * *

(i) For each sample from the survey and survey series, the NO_X emissions reduction percentage shall be determined based upon the tested parameter values for that sample and the appropriate methodology for calculating NO_X emissions reduction at § 80.45; and

* * * * *

(12) For any oxygen content survey series conducted in any covered area the average oxygen content for all samples from the survey series shall be calculated. If this annual average is less than 2.00 percent by weight, the covered area shall have failed an oxygen survey series.

(13) * * *

(v) * * *

(G) The results of the analyses of simple model samples for oxygenate type and oxygen weight percent, benzene content, aromatic hydrocarbon content, and RVP, the calculated toxics emission reduction percentage, and for each survey conducted during the period June 1 through September 15 the VOC emissions reduction percentage calculated using the methodology specified in paragraph (c)(8)(i) of this section;

(H) The results of the analyses of complex model samples for oxygenate type and oxygen weight percent, benzene, aromatic hydrocarbon, and olefin content, E-200, E-300, and RVP, the calculated NO_X and toxics emissions reduction percentage, and for each survey conducted during the period June 1 through September 15 the calculated VOC emissions reduction percentage, except that beginning on January 1, 2000 NO_X emissions

reduction percentages must be reported only for surveys conducted outside the period June 1 through September 15;

* * * * *

(L) The average toxics emissions reduction percentage for simple model samples and the percentage for complex model samples, the average benzene and oxygen percentages, and for each survey conducted during the period June 1 through September 15, the average VOC emissions reduction percentage for simple model samples and the percentage for complex model samples, the average NO_X emissions reduction percentage for all complex model samples collected prior to January 1, 2000, and the average NO_X emissions reduction percentage for samples collected outside the period June 1 through September 15 beginning on January 1, 2000;

* * * * *

12. Section 80.69 is amended by revising paragraphs (a)(7)(ii) introductory text and (b)(3) to read as follows:

§ 80.69 Requirements for downstream oxygenate blending.

* * * * *

(a) * * *

(7) * * *

(ii) In the event the test results for any sample indicate the gasoline does not comply with applicable standards (within the correlation ranges specified in § 80.65(e)(2)(i)), the refiner or importer shall:

* * * * *

(b) * * *

(3) Meet the standard requirements specified in § 80.65(c) and § 80.67(f), the record keeping requirements specified in § 80.74, and the reporting requirements specified in § 80.75; and

* * * * *

13. Section 80.70 is amended by revising paragraphs (d)(3)(viii) and (d)(3)(ix), adding paragraphs (d)(3)(x) and (d)(3)(xi), by revising paragraphs (j)(4)(i), (j)(4)(ii), (j)(10)(iv), (j)(11)(i), and (j)(14)(xvii) and by removing paragraph (j)(15) to read as follows:

§ 80.70 Covered areas.

* * * * *

(d) * * *

(3) * * *

(viii) Suffolk;

(ix) Westchester;

(x) Orange; and

(xi) Putnam.

* * * * *

(j) * * *

(4) * * *

(i) Portion of Bullitt County described as follows:

(A) Beginning at the intersection of Ky 1020 and the Jefferson-Bullitt County Line proceeding to the east along the county line to the intersection of county road 567 and the Jefferson-Bullitt County Line;

(B) Proceeding south on county road 567 to the junction with Ky 1116 (also known as Zoneton Road);

(C) Proceeding to the south on KY 1116 to the junction with Hebron Lane;

(D) Proceeding to the south on Hebron Lane to Cedar Creek;

(E) Proceeding south on Cedar Creek to the confluence of Floyds Fork turning southeast along a creek that meets Ky 44 at Stallings Cemetery;

(F) Proceeding west along Ky 44 to the eastern most point in the Shepherdsville city limits;

(G) Proceeding south along the Shepherdsville city limits to the Salt River and west to a point across the river from Mooney Lane;

(H) Proceeding south along Mooney Lane to the junction of Ky 480;

(I) Proceeding west on Ky 480 to the junction with Ky 2237;

(J) Proceeding south on Ky 2237 to the junction with Ky 61 and proceeding north on Ky 61 to the junction with Ky 1494;

(K) Proceeding south on Ky 1494 to the junction with the perimeter of the Fort Knox Military Reservation;

(L) Proceeding north along the military reservation perimeter to Castleman Branch Road;

(M) Proceeding north on Castleman Branch Road to Ky 44;

(N) Proceeding a very short distance west on Ky 44 to a junction with Ky 1020; and

(O) Proceeding north on Ky 1020 to the beginning.

(ii) Portion of Oldham County described as follows:

(A) Beginning at the intersection of the Oldham-Jefferson County Line with the southbound lane of Interstate 71;

(B) Proceeding to the northeast along the southbound lane of Interstate 71 to the intersection of Ky 329 and the southbound lane of Interstate 71;

(C) Proceeding to the northwest on Ky 329 to the intersection of Zaring Road on Ky 329;

(D) Proceeding to the east-northeast on Zaring Road to the junction of Cedar Point Road and Zaring Road;

(E) Proceeding to the north-northeast on Cedar Point Road to the junction of Ky 393 and Cedar Point Road;

(F) Proceeding to the south-southeast on Ky 393 to the junction of county road 746 (the road on the north side of Reformatory Lake and the Reformatory);

(G) Proceeding to the east-northeast on county road 746 to the junction with Dawkins Lane (also known as Saddlers Mill Road) and county road 746;

(H) Proceeding to follow an electric power line east-northeast across from the junction of county road 746 and Dawkins Lane to the east-northeast across Ky 53 on to the La Grange Water Filtration Plant;

(I) Proceeding on to the east-southeast along the power line then south across Fort Pickens Road to a power substation on Ky 146;

(J) Proceeding along the power line south across Ky 146 and the Seaboard System Railroad track to adjoin the incorporated city limits of La Grange;

(K) Then proceeding east then south along the La Grange city limits to a point abutting the north side of Ky 712;

(L) Proceeding east-southeast on Ky 712 to the junction of Massie School Road and Ky 712;

(M) Proceeding to the south-southwest and then north-northwest on Massie School Road to the junction of Ky 53 and Massie School Road;

(N) Proceeding on Ky 53 to the north-northwest to the junction of Moody Lane and Ky 53;

(O) Proceeding on Moody Lane to the south-southwest until meeting the city limits of La Grange;

(P) Then briefly proceeding north following the La Grange city limits to the intersection of the northbound lane of Interstate 71 and the La Grange city limits;

(Q) Proceeding southwest on the northbound lane of Interstate 71 until intersecting with the North Fork of Currys Fork;

(R) Proceeding south-southwest beyond the confluence of Currys Fork to the south-southwest beyond the confluence of Floyds Fork continuing on to the Oldham-Jefferson County Line; and

(S) Proceeding northwest along the Oldham-Jefferson County Line to the beginning.

* * * * *

(10) * * *

(iv) The portion of Essex County that consists of the portion of Whiteface Mountain above 4,500 feet in elevation.

* * * * *

(11) * * *

(i) Allegheny;

* * * * *

(14) * * *

(xvii) Richmond;

* * * * *

14. Section 80.75 is amended by revising paragraphs (b), (f)(2)(ii)(A) (*1*), and (j) to read as follows:

§ 80.75 Reporting requirements.

* * * * *

(b) *Reports for gasoline or RBOB produced or imported under the simple model.*

(1) *RVP averaging reports.*

(i) Any refiner or importer that produced or imported any reformulated gasoline or RBOB under the simple model that was to meet RVP standards on average ("averaged reformulated gasoline") shall submit to the Administrator, with the third quarterly report, a report for each refinery or importer for such averaged reformulated gasoline or RBOB produced or imported during the previous RVP averaging period. This information shall be reported separately for the following categories:

(A) Gasoline or RBOB which is designated as VOC-controlled intended for areas in VOC-Control Region 1; and

(B) Gasoline or RBOB which is designated as VOC-controlled intended for VOC-Control Region 2.

(ii) The following information shall be reported:

(A) The total volume of averaged reformulated gasoline or RBOB in gallons;

(B) The compliance total value for RVP; and

(C) The actual total value for RVP.

(2) *Sulfur, NO_X* and T90 averaging reports.

(i) Any refiner or importer that produced or imported any reformulated gasoline or RBOB under the simple model shall submit to the Administrator, with the fourth quarterly report, a report for such reformulated gasoline or RBOB produced or imported during the previous year:

(A) For each refinery or importer; or

(B) In the case of refiners who operate more than one refinery, for each grouping of refineries as designated by the refiner pursuant to § 80.41(h)(2)(iii).

(ii) The following information shall be reported:

(A) The total volume of reformulated gasoline or RBOB in gallons;

(B) The applicable sulfur content standard under § 80.41(h)(2)(i) in parts per million;

(C) The average sulfur content in parts per million;

(D) The applicable olefin content standard under § 80.41(h)(2)(i) in volume percent;

(E) The average olefin content in volume percent;

(F) The applicable T90 distillation point standard under § 80.41(h)(2)(i) in degrees Fahrenheit; and

(G) The average T90 distillation point in degrees Fahrenheit.

* * * * *

(f) * * *

(2) * * *

(ii) * * *

(A) * * *

(*1*) Gasoline which is designated as VOC-controlled and oxygenated fuels program reformulated gasoline (OPRG);

* * * * *

(j) *Additional reporting requirements for certain importers.* In the case of any importer to whom different standards apply for gasoline imported at different facilities by operation of § 80.41(q)(2), such importer shall submit separate reports for gasoline imported into facilities subject to different standards.

* * * * *

15. Section 80.76 is amended by revising paragraphs (c)(2), (c)(3) introductory text, (c)(3)(i), and (c)(3)(ii) to read as follows:

§ 80.76 Registration of refiners, importers or oxygenate blenders.

* * * * *

(c) * * *

(2) For each separate refinery and oxygenate blending facility, the facility name, physical location, contact name, telephone number, and type of facility; and

(3) For each separate refinery and oxygenate blending facility, and for each importer's operations in a single PADD:

(i) Whether records are kept on-site or off-site of the refinery or oxygenate blending facility, or in the case of importers, the registered address;

(ii) If records are kept off-site, the primary off-site storage facility name, physical location, contact name, and telephone number; and

* * * * *

16. Section 80.77 is amended by revising paragraphs (g)(2)(iii), (g)(2)(iv)(A) and (B), adding paragraph (g)(3), and by revising paragraph (h) introductory text to read as follows:

§ 80.77 Product transfer documentation.

* * * * *

(g) * * *

(2) * * *

(iii) In the case of VOC-controlled gasoline subject to the simple model standards, RVP;

(iv) * * *

(A) Prior to January 1, 1998, the NOx emissions performance minimum, and for VOC-controlled gasoline the VOC emissions performance minimum, in milligrams per mile; and

(B) Beginning on January 1, 1998, the NOx emissions performance minimum, and for VOC-controlled gasoline the VOC emissions performance minimum; and

(3) Identification of VOC-controlled reformulated gasoline or RBOB as gasoline or RBOB which contains ethanol, or which does not contain any ethanol.

(h) Prior to January 1, 1998, in the case of reformulated gasoline or RBOB subject to the complex model standards:

* * * * *

17. Section 80.78 is amended by revising paragraphs (a)(1)(v) (B) and (C) to read as follows:

§ 80.78 Controls and prohibitions on reformulated gasoline.

(a) * * *

(1) * * *

(v) * * *

(B) Unless each gallon of such gasoline that is subject to simple model standards has an RVP which is less than or equal to the applicable RVP maximum specified in § 80.41;

(C) Unless each gallon of such gasoline that is subject to complex model standards has a VOC and NOx emissions reduction percentage which is greater than or equal to the applicable minimum specified in § 80.41.

* * * * *

18. Section 80.81 is amended by revising paragraphs (a)(2)(iii), (b)(4), and (h) to read as follows:

§ 80.81 Enforcement exemptions for California gasoline.

(a) * * *

(2) * * *

(iii) Is imported into the State of California from inside the United States and that is manufactured at a refinery that does not produce reformulated gasoline for sale in any covered area outside the State of California.

(b) * * *

(4) The compliance demonstration required by paragraph (b)(3)(ii) of this section shall be submitted no later than May 31, 1996, along with the report for the first quarter of 1996 required to be submitted under § 80.75(a)(1)(i).

* * * * *

(h) For purposes of the batch sampling and analysis requirements contained in § 80.65(e)(1), any refiner, importer or oxygenate blender of California gasoline may, with regard to such gasoline, use a sampling and/or analysis methodology prescribed in Title 13, California Code of Regulations, sections 2260 *et seq.*, in lieu of any applicable methodology specified in § 80.46.

* * * * *

19. In § 80.90, the equation in paragraph (b)(1) is revised, and paragraph (e)(2) is revised to read as follows:

§ 80.90 Conventional gasoline baseline emissions determination.

* * * * *

(b) * * *

(1) * * *

EXHBEN = (1.884 + 0.949xBZ + 0.113x(AR − BZ))

* * * * *

(e) * * *

(2) The annual average baseline NO_X emissions of the facility shall be determined using the emissions values determined in paragraph (e)(1) of this section in the equation specified in paragraph (a) of this section.

* * * * *

20. Section 80.91 is amended by:

a. adding paragraph (c)(5)(iv);

b. adding a sentence to the end of paragraph (d)(1)(i)(A) introductory text;

c. revising paragraph (d)(1)(i)(A)*(1)*, and revising the last sentence in paragraph (d)(1)(i)(B);

d. revising the equation and the definition of T_{js} in paragraph (e)(2)(iv), and revising the definition of T_{js} in paragraph (e)(2)(v)(A);

e. revising the equations in paragraphs (e)(4)(i) (A) and (B), and the equation and definition of UV in paragraph (e)(4)(ii)(A) and the equation in paragraph (e)(4)(ii)(B);

f. revising the second sentence of paragraph (e)(5)(vi);

g. adding paragraphs (e)(5)(vi)(A) and (e)(5)(vi)(B);

h. and i. revising paragraph (e)(5)(vii) introductory text, and revising paragraph (e)(5)(viii);

j. and k. revising paragraph (e)(7)(i)(A);

l. revising paragraphs (e)(7)(i)(C) and (f)(2)(ii); and

m. adding paragraph (e)(7)(i)(D).

The revisions and additions are set out to read as follows:

§ 80.91 Individual baseline determination.

* * * * *

(c) * * *

(5) * * *

(iv) The annual average anti-dumping statutory baseline shall have the following set of emission values:

Exhaust benzene emissions, simple model—6.45

Exhaust benzene emissions, complex model—33.03 mg/mile

Exhaust toxics emissions, Phase I—50.67 mg/mile

Exhaust toxics emissions, Phase II—104.5 mg/mile

NO_X emissions, Phase I—714.4 mg/mile

NO_X emissions, Phase II—1461. mg/mile

(d) * * *

(1) * * *

(i) * * *

(A) * * * When method 1 per batch RVP data is available, a month is considered equivalent to 4 weeks of seasonal data.

(1) Method 1, per batch, actual RVP data will be used to define that batch as either summer fuel or winter fuel. Summer fuel is defined as fuel produced and intended for sale to satisfy federal summer volatility standards. When such per batch actual RVP data is not available, data is allocated per month as follows. A summer month is defined as any month during which more than 50 percent (by volume) of the gasoline produced by a refiner met the federal summer gasoline volatility requirements. Winter shall be any month which could not be considered a summer month under this definition.

* * * * *

(B) * * * In any case, all data collected through the date of collection of the last data point included in the determination of a baseline fuel parameter value must be utilized in the baseline determination of that fuel parameter.

* * * * *

(e) * * *

(2) * * *

(iv) * * *

$$X_{bs}^{m_s} = \sum_{j=1}^{T_{js}} \left\{ \frac{}{N_s} \times \left(\frac{\sum_{i=1}^{n_{js}} X_{ijs}}{n_{js}} + \frac{\sum_{i=1}^{p_{js}} \left(X_{ijs} \times V_{ijs} \times SG_{ijs} \right)}{\sum_{i=1}^{p_{js}} \left(V_{ijs} \times SG_{ijs} \right)} \right) \right\}$$

* * * * *

T_{js} = total 1990 volume of blendstock j used in the refinery's season s gasoline

* * * * *

(v) * * *

(A) * * *

T_{js} = total 1990 volume of blendstock j used in the refinery's season s gasoline

* * * * *

(4) * * *

(i) * * *

(A) * * *

UV = [AV/(100 − OV)] x 100

$$UR = \left[BR - \left\{ \sum_{i=1}^{n} \left(OV_i \times OR_i \right) \right\} / 100 \right] \Big/ \left[\left\{ 100 - \sum_{i=1}^{n} OV_i \right\} / 100 \right]$$

* * * * *

(B) * * *

* * * * *

(ii) * * *

(A) * * *

AV = UV x (100 − OV)/100

* * * * *

UV = non-oxygenated parameter value

* * * * *

(B) * * *

$$BR = \left\{ UR \times \left[100 - \sum_{i=1}^{n} (OV_i) \right] + \sum_{i=1}^{n} \left(OV_i \times OR_i \right) \right\} / 100$$

* * * * *

(5) * * *

(vi) * * *Such data shall be used in the determination of the baseline value, due to the work-in-progress, of each of the fuel parameters specified in § 80.91(a)(2)(i) and as verification of the effect of the work-in-progress.

(A) The baseline value, due to the work-in-progress, of each of the fuel parameters specified in § 80.91(a)(2)(i) shall be used in the determination of the emissions specified in § 80.90.

(B) The baseline values of sulfur, olefins and E300, due to the work-in-progress, shall be used in the determination of the emissions specified in § 80.41(j)(3).

(vii) The annual average baseline values of exhaust benzene emissions, per § 80.90(b) and § 80.90(c), exhaust toxics emissions, per § 80.90(d), and NO_X emissions, per § 80.90(e), are the values resulting from the work-in-progress baseline adjustment, not to exceed the larger of:

* * * * *

(viii) When compliance is achieved using the simple model, per § 80.41 and/or § 80.101, the baseline values of sulfur, olefins and T90 are the values resulting from the work-in-progress baseline adjustment, not to exceed the larger of:

(A) The unadjusted annual average baseline value of each fuel parameter specified in paragraph (e)(5)(viii) of this section; or

(B) The following values:

(*1*) Sulfur, 355 ppm;

(*2*) Olefins, 11.3 volume percent;

(*3*) T90, 349 °F; or

(C) An adjusted annual average baseline fuel parameter value for sulfur, olefins and T90 such that exhaust emissions of VOC, toxics, and NO_X do not exceed the complex model emission levels specified in paragraph (e)(5)(vii)(B) of this section. In the petition for a work-in-progress adjustment, the refiner shall specify sulfur, olefins and T90 values that meet these emission levels.

* * * * *

(7) * * *

(i) * * *

(A) (*1*) The refinery is the only refinery of a refiner such that it cannot form an aggregate baseline with another refinery (per paragraph (f) of this section) and meets the requirements specified in paragraphs (e)(7)(i) (B) and (C); or

(*2*) The refiner is a multi-refinery refiner where each of the refineries also meets the requirements specified in paragraphs (e)(7)(i) (B) and (D).

* * * * *

(C) For single refinery refiners, the ratio of a refiner's 1990 JP–4 production to its 1990 gasoline production must equal or exceed 0.2.

(D) For multi-refinery refiners, the 1990 JP–4 production to 1990 gasoline production ratio must equal or exceed 0.2. The ratio of a multi-refinery refiner must be calculated over all of its refineries (aggregated).

* * * * *

(f) * * *

(2) * * *

(ii) If the baseline fuel value for aromatics, olefins, and/or benzene (determined per paragraph (e) of this section) is higher than the high end of the valid range limits specified in § 80.42(c)(1) if compliance is being determined under the Simple Model, or in § 80.45(f)(1)(ii) if compliance is being determined under the Complex Model, then the valid range limits may be extended for conventional gasoline in the following manner:

(A) The new high end of the valid range for aromatics is determined from the following equation:

NAROLIM = AROBASE + 5.0 volume percent

where

NAROLIM = The new high end of the valid range limit for aromatics, in volume percent

AROBASE = The seasonal baseline fuel value for aromatics, in volume percent

(B) The new high end of the valid range for olefins is determined from the following equation:

NOLELIM = OLEBASE + 3.0 volume percent

where

NOLELIM = The new high end of the valid range limit for olefins, in volume percent

OLEBASE = The seasonal baseline fuel value for olefins, in volume percent

(C) The new high end of the valid range for benzene is determined from the following equation:

NBENLIM = BENBASE + 0.5 volume percent

where

NBENLIM = The new high end of the valid range limit for benzene, in volume percent

BENBASE = The seasonal baseline fuel value for benzene, in volume percent

(D) The extension of the valid range is limited to the applicable summer or winter season in which the baseline fuel values for aromatics, olefins, and/or benzene exceed the high end of the valid range as described in paragraph (f)(2)(ii) of this section. Also, the extension of the valid range is limited to use by the refiner whose baseline value for aromatics, olefins, and/or benzene was higher than the valid range limits as described in paragraph (f)(2)(ii) of this section.

(E) Any extension of the Simple Model valid range limits is applicable only to the Simple Model. Likewise any extension of the Complex Model valid range limits is applicable only to the Complex Model.

(F) The valid range extensions calculated in paragraphs (f)(2)(ii)(A), (B), and (C) of this section are applicable to both the baseline fuel and target fuel for the purposes of determining the compliance status of conventional gasolines. The extended valid range limit represents the maximum value for that parameter above which fuels cannot be evaluated with the applicable compliance model.

(G) Under the Simple Model, baseline and compliance calculations shall subscribe to the following limitations:

(*1*) If the aromatics valid range has been extended per paragraph (f)(2)(ii)(A) of this section, an aromatics value equal to the high end of the valid range specified in § 80.42(c)(1) shall be used for the purposes of calculating the exhaust benzene fraction.

(*2*) If the fuel benzene valid range has been extended per paragraph (f)(2)(ii)(C) of this section, a benzene value equal to the high end of the valid range specified in § 80.42(c)(1) shall be used for the purposes of calculating the exhaust benzene fraction.

(H) Under the Complex Model, baseline and compliance calculations shall subscribe to the following limitations:

(*1*) If the aromatics valid range has been extended per paragraph (f)(2)(ii)(A) of this section, an aromatics value equal to the high end of the valid range specified in § 80.45(f)(1)(ii) shall be used for the purposes of calculating emissions performances.

(*2*) If the olefins valid range has been extended per paragraph (f)(2)(ii)(B) of this section, an olefins value equal to the high end of the valid range specified in § 80.45(f)(1)(ii) shall be used for the target fuel for the purposes of calculating emissions performances.

(*3*) If the benzene valid range has been extended per paragraph (f)(2)(ii)(C) of this section, a benzene value equal to the high end of the valid range specified in § 80.45(f)(1)(ii) shall be used for the target fuel for the purposes of calculating emissions performances.

* * * * *

21. In § 80.93, the first sentence of paragraph (a)(3)(ii) is revised, and

paragraph (a)(3)(iv) is added, and paragraph (c)(9) is revised as follows:

§ 80.93 Individual baseline submission and approval.

(a) * * *

(3) * * *

(ii) Petitions, 'showings,' and other associated proof may be submitted to EPA prior to submittal of the individual baseline (per paragraphs (a)(1) and (a)(2) of this section). * * *

* * * * *

(iv) Petitions submitted prior to the deadline for baseline submittals shall be submitted to the EPA at the following address: Fuels Studies and Standards Branch, Baseline Petition, U.S. EPA, 2565 Plymouth Road, Ann Arbor, Michigan 48105.

* * * * *

(c) * * *

(9) *Other baseline information.* Narrative discussing any aspects of the baseline determination not already indicated per the requirements of paragraph (c)(8) of this section shall be provided.

* * * * *

22. Section 80.101 is amended by revising paragraphs (e)(3), (f)(4)(i), (f)(4)(ii), (g)(1), and (i)(1) introductory text to read as follows:

§ 80.101 Standards applicable to refiners and importers.

* * * * *

(e) * * *

(3) California gasoline as defined in § 80.81(a)(2); and

* * * * *

(f) * * *

(4) * * *

(i) If the total volume of the conventional gasoline, RBOB, reformulated gasoline, and California gasoline as defined in § 80.81(a)(2), produced or imported by any refiner or importer during the averaging period is equal to or less than that refiner's or importer's 1990 baseline volume as determined under § 80.91(f)(1), the compliance baseline for each parameter or emissions performance shall be that refiner's or importer's individual 1990 baseline; or

(ii) If the total volume of the conventional gasoline, RBOB, reformulated gasoline, and California gasoline as defined in § 80.81(a)(2), produced or imported by any refiner or importer during the averaging period is greater than that refiner's or importer's 1990 baseline volume as determined under § 80.91(f)(1), the compliance baseline for each parameter or emissions performance shall be calculated according to the following formula:

$$CB_i = \left(B_i * \left(\frac{V_{1990}}{V_a} \right) \right) + \left(DB_i * \left(1 - \frac{V_{1990}}{V_a} \right) \right)$$

where

CB_i = the compliance baseline value for parameter or emissions performance i

B_i = the refiner's or importer's individual baseline value for parameter or emissions performance i calculated according to the methodology in § 80.91

DB_i = the anti-dumping statutory baseline value for parameter or emissions performance i, as specified at § 80.91(c)(5)(iii) or (c)(5)(iv), respectively

V_{1990} = the 1990 baseline volume as determined under § 80.91(f)(1)

V_a = the total volume of reformulated gasoline, conventional gasoline, RBOB, and California gasoline as defined in § 80.81(a)(2) produced or imported by a refiner or importer during the averaging period

(g) * * *

(1) (i) *Simple model calculations.* In the case of any refiner or importer subject to an individual refinery baseline, the annual average value for each parameter or emissions performance during the averaging period, calculated according to the following methodologies, shall be less than or equal to the refiner's or importer's standard under paragraph (b) of this section for that parameter.

(A) The average value for sulfur, T–90, olefin, benzene, and aromatics for an averaging period shall be calculated as follows:

$$APARM = \left(\frac{\sum_{i=1}^{n} \left(V_i \times PARM_i \times SG_i \right)}{\sum_{i=1}^{n} V_i \times SG_i} \right)$$

where

APARM = the average value for the parameter being evaluated

V_i = the volume of conventional gasoline or other products included under paragraph (d) of this section, in batch i

$PARM_i$ = the value of the parameter being evaluated for batch i as determined in accordance with the test methods specified in § 80.46

n = the number of batches of conventional gasoline and other products included under paragraph (d) of this section produced or imported during the averaging period

SG_i = specific gravity of batch i (only applicable for sulfur)

(B) Exhaust benzene emissions under the Simple Model for an averaging period are calculated as follows:

$$EXHBEN = 1.884 + (0.949 \times BZ) + (0.113 \times (AR - BZ))$$

where

EXHBEN = the average exhaust benzene emissions for the averaging period

BZ = the average benzene content for the averaging period, calculated per paragraph (g)(1)(i)(A) of this section

AR = the average aromatics content for the averaging period, calculated per paragraph (g)(1)(i)(A) of this section

(ii) *Complex model calculations.* Exhaust benzene, exhaust toxics, and exhaust NO_X emissions performance for each batch shall be calculated in accordance with the applicable model under § 80.45.

* * * * *

(i) * * *

(1) Any refiner or importer shall for each batch of conventional gasoline, and other products if included in paragraph (d) of this section:

* * * * *

23. Section 80.102 is amended by revising the formula in paragraph (b)(1) and the definition of V_{bs}, the formula in paragraph (d)(1)(i) and the definitions of V_{bs} and V_g, the formula in paragraph (d)(2)(i) and the definition of $V_{g,i}$, paragraph (d)(3)(iv), adding paragraph

(d)(3)(v), and revising paragraphs (e)(2)(i) and (f)(2)(i) to read as follows:

§ 80.102 Controls applicable to blendstocks.

* * * * *

(b)(1) * * *

$$BG_{by} = \frac{V_{bs}}{V_g}$$

* * * * *

V_{bs} = Volume of applicable blendstock produced or imported and transferred to others during the calendar year, and used to produce gasoline

* * * * *

(d) * * *

(1) * * *

(i) * * *

$$BG_a = \frac{V_{bs}}{V_g}$$

* * * * *

V_{bs} = Volume of applicable blendstock produced or imported and subsequently transferred to others during the averaging period

V_g = Volume of conventional gasoline, reformulated gasoline and RBOB produced or imported during the averaging period, excluding California gasoline as defined in § 80.81(a)(2)

* * * * *

(2) * * *

(i) * * *

$$BGC_{comp} = \frac{\sum_{i=1}^{n} V_{bs,i}}{\sum_{i=1}^{n} V_{g,i}}$$

* * * * *

$V_{g,i}$ = Volume of conventional gasoline, reformulated gasoline and RBOB produced or imported during averaging period i, excluding California gasoline as defined in § 80.81(a)(2)

* * * * *

(3) * * *

(iv) Transferred between refineries which have been grouped pursuant to § 80.101(h) by a refiner for the purpose of determining compliance under this subpart; or

(v) Used to produce California gasoline as defined in § 80.81(a)(2).

* * * * *

(e) * * *

(2) * * *

(i) Include all blendstocks produced or imported and transferred to others in its compliance calculations under § 80.101(g) for two averaging periods beginning on January 1 of the averaging period subsequent to the averaging period when the exceedance occurs;

* * * * *

(f) * * *

(2) * * *

(i) EPA may grant the waiver referred to in paragraph (f)(1)(iii) of this section if the level of blendstock production was the result of extreme or unusual circumstances (e.g., a natural disaster or act of God) which clearly are outside the control of the refiner or importer, and which could not have been avoided by the exercise of prudence, diligence, and due care.

* * * * *

24. Section 80.104 is amended by revising paragraph (a)(2)(ix) to read as follows:

§ 80.104 Recordkeeping requirements.

* * * * *

(a) * * *

(2) * * *

(ix) In the case of any refinery-produced or imported products listed in § 80.102(a) that are excluded under § 80.102(d)(3), documents which demonstrate that basis for exclusion; and

* * * * *

25. Section 80.105 is amended by revising paragraph (a)(2) to read as follows:

§ 80.105 Reporting requirements.

(a) * * *

(2) (i) The total gallons of applicable blendstocks produced or imported and transferred to others that are not excluded under § 80.102(d)(3); and

(ii) The total gallons of applicable blendstocks produced or imported and transferred to others that are excluded under § 80.102(d)(3);

* * * * *

26. Section 80.125 is amended by revising paragraph (a) to read as follows:

§ 80.125 Attest engagements.

(a) Any refiner, importer, and oxygenate blender subject to the requirements of this subpart F shall engage an independent certified public accountant, or firm of such accountants (hereinafter referred to in this subpart F as "CPA"), to perform an agreed-upon procedure attestation engagement of the underlying documentation that forms the basis of the reports required by §§ 80.75 and 80.105.

* * * * *

27. Section 80.128 is amended by revising paragraphs (e)(2), (e)(5), and (g)(3)(iii) to read as follows:

§ 80.128 Agreed upon procedures for refiners and importers.

* * * * *

(e) * * *

(2) Determine that the requisite contract was in place with the downstream blender designating the required blending procedures, or that the refiner or importer accounted for the RBOB using the assumptions in § 80.69(a)(9);

* * * * *

(5) Agree the sampling and testing frequency of the refiner's or importer's downstream oxygenated blender quality assurance program with the sampling and testing rates as required in § 80.69(a)(7).

* * * * *

(g) * * *

(3) * * *

(iii) Obtain a listing from the refiner or importer of the batches of conventional gasoline or conventional sub-octane blendstock, and the compliance calculations which include oxygenate blended by the downstream oxygenate blender, and test the mathematical accuracy of the calculations contained in this listing;

* * * * *

28. Section 80.129 is amended by revising paragraph (e) to read as follows:

§ 80.129 Agreed upon procedures for downstream oxygenate blenders.

* * * * *

(e) Agree the sampling and testing frequency of the blender's quality assurance program with the sampling and testing rates required in § 80.69.

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40 CFR Part 85

[AMS–FRL–5011–9]

Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is promulgating a final rule that sets forth requirements and procedures for EPA authorization of California enforcement of standards and other requirements relating to the control of emissions from new nonroad vehicles or engines under section 209(e) of the Clean Air Act (Act), as amended.

The rule includes definitions of the categories of new nonroad engines and vehicles that the Act specifies as preempted from state regulation. These

definitions of "farm equipment", "construction equipment", and "locomotive" clarify which nonroad engines and vehicles may be subject to state regulation because such regulation is not preempted. The definition of "new" in this rulemaking applies to all new nonroad engines and vehicles with the exception of locomotives and engines used in locomotives. This rule also provides procedures by which EPA may authorize California to enforce standards and provides guidance for states that adopt California standards. Finally, the rule discusses the criteria to be used by EPA in its analysis of California authorization requests. The rule will provide guidance to California, other states, and vehicle and engine manufacturers regarding new nonroad engine and vehicle preemption.

EFFECTIVE DATE: This regulation becomes effective August 19, 1994.

ADDRESSES: Copies of material relevant to this rulemaking have been placed in Docket A–91–18 and are available for public inspection between the working hours of 8 a.m. to 4 p.m., Monday through Friday, at: U.S. Environmental Protection Agency, Air and Radiation Docket and Information Center, Room M1500, First Floor Waterside Mall, 401 M Street, SW., Washington, DC 20460 (Telephone (202) 260–7548). A reasonable fee will be charged by EPA for copying docket material.

FOR FURTHER INFORMATION CONTACT: David Dickinson, Attorney Advisor, Manufacturers Operations Division (6405–J), U.S. Environmental Protection Agency, Washington, DC 20460, Telephone: (202) 233–9256.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Statutory Authority and Background

EPA is required under section 209(e) of the Clean Air Act (Act), as amended, 42 U.S.C. 7543, to "issue regulations to implement" subsection (e). Section 209(e) of the Act addresses the state adoption of emission standards for new nonroad vehicles and engines.

Under section 209(e), all states are preempted from adopting emissions standards for "[n]ew engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower" or for "[n]ew locomotives or new engines used in locomotives". In this final rule, EPA defines these preempted categories, except that EPA does not define the term "new" with respect to locomotives and engines used in locomotives. For new nonroad engines and vehicles not included in the preempted categories, EPA is directed to authorize California, after notice and opportunity for public hearing, to enforce such standards and other requirements as California adopts for the regulation of such engines and vehicles, if these regulations meet the criteria set forth in the Act. Several of the criteria to be used for nonroad engine and vehicle authorizations are similar to the requirements applicable to waivers of Federal preemption of emission standards for new motor vehicles under section 209(b). Section 209(a) prohibits state adoption of emission standards for new motor vehicles and engines. Section 209(b) directs EPA to waive this prohibition for California if certain criteria are met. Other states may adopt California nonroad vehicle or engine emission standards under section 209(e) if they comply with several requirements.

This rule was proposed at 56 FR 45866, Sept. 6, 1991. A public hearing was held on September 20, 1991. Many industries presented comments through an association or individually. Represented in the comments presented at the hearing and submitted in writing are the following: engine manufacturers; manufacturers and dealers of various types of equipment including agricultural, construction, mining, utility, and lawn and garden; manufacturers of emission controls; railroads; manufacturers of industrial trucks; the San Diego County Air Pollution Control District; and the State of California.

II. Discussion of Final Rule and Comments Received

A. Changes to Proposed Rule for Final Rule

After reviewing the comments received, EPA has made the following changes to the Notice of Proposed Rulemaking (NPRM) for the final rule. First, the final rule establishes one definition of "new" that applies equally to domestically manufactured and imported vehicles and engines. Second, the definition of "new" applies to all nonroad engines other than locomotives and engines used in locomotives. EPA will define "new" locomotives and "new" engines used in locomotives in its locomotive standards promulgated under section 213 of the Act. Third, in the final rule EPA defines the word "commercial," as used in the definitions of "farm equipment" and "construction equipment." Fourth, EPA makes minor modifications to the definitions of "construction equipment" and "locomotive." Fifth, the proposed federal labeling requirement is deleted. Sixth, EPA changes its interpretation of section 209(e) so that California may adopt, but not enforce, nonroad standards prior to EPA authorization. Seventh, EPA changes the standard of review of California's primary use determination to a preponderance of the evidence standard. Finally, EPA changes its interpretation of "consistent with this section" in section 209(e)(2)(A)(iii) to include section 209(b)(1)(C).

B. Nonroad Engines and Vehicles

In the NPRM, EPA acknowledged that at some point it would be necessary to clarify whether certain internal combustion engines, such as those used in movable pumps, generators, and compressors, are stationary sources and therefore subject to regulations under Title I of the Act or are mobile sources and therefore potentially subject to nonroad regulations under Title II of the Act. The issue is complex. The definitions of "stationary source" in sections 111(3) and 302(z) of the Act and of "nonroad engine" in section 216(10) of the Act do not make clear under which Title certain internal combustion engines belong. The engines in question are those used in equipment for reasons other than propulsion.

Ingersoll-Rand, the Engine Manufacturers Association (EMA), and the Equipment Manufacturers Institute (EMI), among others, commented that EPA should determine in this rulemaking that both self-propelled and transportable equipment are mobile sources. This would clarify to manufacturers that transportable farm and construction equipment are exempted from state regulation for purposes of control of emissions.

EPA agrees that the above issue needs to be addressed and has resolved this issue in a rulemaking implementing

section 213 of the Act.[1] Section 213 requires EPA to "conduct a study of emissions from nonroad engines and nonroad vehicles to determine if such emissions cause, or significantly contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." The section further provides that if the Administrator determines that nonroad emissions are "significant contributors" in more than one ozone or carbon monoxide (CO) nonattainment area, the Administrator shall promulgate standards for such nonroad engines.

EPA studied nonroad emissions and issued a report in November 1991.[2] In the June 17, 1994 rulemaking EPA determined, based on the study data and the docket of the rulemaking (A–91–24), that emissions from nonroad sources are significant contributors to ozone and CO in more than one nonattainment area. EPA's final rule also includes regulations that set forth emission standards for CO, hydrocarbon (HC), oxides of nitrogen (NO_X) and smoke emissions from large new nonroad compression-ignition engines at or above 37 kilowatts in power, with the exclusion for certain types of engines.[3] Within EPA's 37 kilowatt and above nonroad rule a definition of nonroad engine is provided. Section 89.2 of the 37 kilowatt and above rule provides the following definition:

Nonroad engine means:

(1) Except as discussed in (2) below, a nonroad engine is any internal combustion engine:

(i) in or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers); or

(ii) in or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); or

(iii) that, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

(2) An internal combustion engine is not a nonroad engine if:

(i) the engine is used to propel a motor vehicle or a vehicle used solely for competition, or is subject to standards promulgated under section 202 of the Act; or

(ii) the engine is regulated by a federal New Source Performance Standard promulgated under section 111 of the Act; or

(iii) the engine otherwise included in (1)(iii) remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility, or installation. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. A seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least two years) and that operates at that single location approximately three (or more) each year. This paragraph does not apply to an engine after the engine is removed from the location.

For purposes of consistency with section 213, and the reasons set forth in the 37 kilowatt and above regulation,[4] EPA has decided to adopt and apply this definition to today's section 209(e) rulemaking.

The California Air Resources Board's (CARB) utility engine regulation (the California Utility Rule) affects only engines smaller than 25 horsepower. EPA believes that equipment that uses such small engines is intended to be mobile. For example, equipment that uses engines smaller than 25 horsepower includes hand-held and portable equipment, which EPA believes are clearly nonroad, mobile sources.

C. Definition of "New" as Used in "New Nonroad Engine," and "New Nonroad Vehicle"

In the NPRM, EPA defined "new nonroad engine" and "new nonroad vehicle" to mean a nonroad engine or a nonroad vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser. Ultimate purchaser was proposed to be defined as the first person who in good faith purchases such a new nonroad vehicle or nonroad engine for purposes other than resale. Additionally, with respect to imported nonroad engines, FPA proposed to define "new" nonroad engine to be a nonroad engine manufactured after the effective date of a regulation issued under section 213 which would be applicable to such engine had it been manufactured for importation into the United States. These definitions also applied to "new locomotives" and "new engines used in locomotives."

Comments on EPA's proposed definition of "new" were several. First, CARB, the San Diego Air Pollution Control Board (SDAPCB), and the Manufacturers of Emissions Controls Association (MECA) supported EPA's definition. CARB asked that EPA clarify which regulatory activities states may perform; for example, whether states may require in-use testing and impose add-on or retrofit requirements. On the other hand, many commenters, including U.S. Representative Terry Bruce, the Equipment Manufacturers Institute (EMI), the Engine Manufacturers Association (EMA), and the Portable Power Equipment Manufacturers Association (PPEMA), opposed EPA's proposed definition and proposed that "new" should mean manufactured after either the effective date of the Clean Air Act Amendments, November 15, 1990, or after federal regulations take effect. These commenters believe that Congress intended an "absolute" preemption. That is, the nonroad engines and vehicles in the preempted categories manufactured after November 15, 1990 would never be subject to any kind of state emission regulation. EMA commented that if EPA does not accept the latter definition, it should expand its proposed definition so that engines remain "new" until they have exceeded their useful life.

Commenters in the railroad industry also supported a definition of "new" as "manufactured after November 1990" and stated further that the railroad industry has traditionally been preempted from state regulation, such as in the area of safety. The same commenters indicated that they believe that state control of locomotive emissions or state enforcement of federal standards would interfere with interstate commerce. Railroad commenters also stated that any standards for rebuilt or remanufactured engines or locomotives should be uniform federal standards—not state standards. Furthermore, if remanufactured engines were rebuilt to comply with such federal standards, they should be considered "new".

[1] On June 17, 1994 a final rule was published (59 FR 31306) for nonroad engines 37 kilowatts (50 horsepower) which provides a definition of nonroad engine.

[2] Nonroad Engine and Vehicle Emission Study, EPA publication number 21A–2001, November, 1991. Available in EPA docket A–91–24 or from the National Technical Information Service (NTIS).

[3] 59 FR 31306, June 17, 1994.

[4] EPA incorporates by reference the 37 kilowatt and above nonroad regulation at 59 FR 31306, June 17, 1994.

Commenters also opposed the proposed definition regarding imported vehicles and engines because the definition of "new" was different depending upon whether the nonroad engine was produced domestically or abroad.

These proposed definitions for "new nonroad vehicles" and "new nonroad engines" parallel the definitions of "new motor vehicles" and "new motor vehicle engines" in section 216 of the Clean Air Act. The definition of "new" proposed for imported nonroad engines was intended to address nonconforming engines which may become subject to federal emission requirements at the time the engine or vehicle is imported into the United States. The Agency has decided to delete this definition of "new" for imported engines. EPA agrees with the commenters that imports and domestic products should generally be treated alike for regulatory purposes. The Agency has addressed the importation of nonroad engines which do not conform to federal emission standards at the time of importation.[5] Today's rule, in any event, treats domestic and imported nonroad engines the same way for purposes of determining whether they are preempted from state regulation.

This final rule establishes a definition for all domestically manufactured and imported "new nonroad engines," "new nonroad vehicles," other than "new locomotives" and "new engines used in a locomotive."[6] New nonroad engines and new nonroad vehicles are defined as engines and vehicles the equitable or legal title to which has not been transferred to an ultimate purchaser. The ultimate purchaser is defined as the first person who in good faith purchases such engine or vehicle for purposes other than resale. For some engines or vehicles the passage of title in the United States may not formally occur or manufacturers may retain title and lease the engines or equipment. In these cases, a domestic or imported nonroad engine or nonroad vehicle will retain its status as "new" until such engine or vehicle is "placed into service." An engine or vehicle is considered "placed into service" when the engine or vehicle is used for its functional purposes. EPA believes that the definition of new should include the "placed into service" addition to the motor vehicle definition of new found in section 216 of the Act because of the nature of the nonroad market. Nonroad engines and nonroad vehicles are often leased and maintained by the manufacturer well into the useful life of the nonroad equipment. A piece of equipment, the title of which has passed to the ultimate purchaser, should not be treated differently than a piece of equipment which is being used but has not yet passed to an ultimate purchaser.

The Agency believes that this definition of "new" comports with the language, intent and structure of the Clean Air Act and the definition of "new" contained in the 37 kilowatt and above regulation and is therefore a permissible construction of the statute. Contrary to the assertion of some commenters, EPA's definition of "new" is consistent with the dictionary definition of the word as "having existed or been made but a short time." Webster's Ninth New Collegiate Dictionary, 1990. Generally speaking, manufactured products are sold soon after they are made and are considered new until they are sold or used. The commenters' definition of new—anything manufactured after the Clean Air Act Amendments' enactment or an applicable regulation's promulgation—would mean, by contrast, that any engine manufactured after a certain date would be new forever. This is certainly not the plain meaning of "new." Congress could have stated that the federal preemption applied to certain equipment manufactured after a certain date, but Congress did not do so. Elsewhere in Title II, Congress specified that a provision only applied to products manufactured after a certain date (*see*, section 218 requiring a ban on engines manufactured after the 1992 model year that require leaded gasoline) or first introduced into commerce after a certain date (*see*, section 211(f) regarding prohibition on fuels that are not substantially similar to fuels used to certify vehicles as meeting emission standards). The lack of such a date here further supports that Congress intended "new" to mean newly manufactured and not yet sold.

The legislative record also shows Congressional intent that "new" should refer to newly manufactured products. In his colloquy with Senator Wilson explaining the final version of section 209(e), Senator Chafee notes that "because the preemption is limited to new engine standards only, States can continue to require existing *and in-use* nonroad engines to reduce emissions . . ." [Emphasis added] 136 Cong. Rec. S17237 (October 26, 1990). This language is echoed by similar language from Senator Baucus in his report to the Senate on the conference bill. 136 Cong. Rec. S16976 (October 27, 1990). If Congress intended the definition of new nonroad engines or equipment, and as a result the preemption, to apply to an engine for its entire life, then it would appear that there would be no distinction between new and in-use nonroad engines, as an engine manufactured after a certain date would always be new. Yet the statements of Senator Chafee and Senator Baucus clearly contemplate such a distinction.

The Agency's definition of new is also consistent with the way the Act approaches motor vehicle emission control. As noted earlier, section 216 defines new in the context of motor vehicles as "a motor vehicle the equitable or legal title to which has never been transferred to an ultimate purchaser." The Act applies federal emissions standards to "new" vehicles. These federal standards are enforced through certification, assembly line, and recall testing. States, on the other hand, have a role in motor vehicle emission control through inspection/maintenance programs and are not restricted from controlling used vehicles. The section 209(a) prohibition of state regulation of motor vehicles addresses only "new" motor vehicles and engines and prohibits state regulation that occurs before sale, titling, or registration of the vehicle.[7]

The Clean Air Act Amendments of 1990 take a parallel approach to nonroad standards and enforcement. Section 213 provides EPA with authority to set standards for "new" engines and provides for federal enforcement of such standards in the same manner as motor vehicle enforcement. Furthermore, nothing on the face of section 209(e) or section 213 indicates that Congress intended "new" to be interpreted differently in the nonroad and motor vehicle contexts. Given that the preemption provisions for new motor vehicles and new nonroad engines appear in the same section of the Clean Air Act, it is reasonable to believe that Congress did not intend for the word "new" to be defined differently within the same

[5] *See* 59 FR 31306, June 17, 1994, which sets forth CO, HC, particulate matter, NO_x, and smoke opacity standards for 50 hp and above nonroad engines and vehicles. EPA is imposed certain restrictions on the importation of nonconforming nonroad engines based on existing regulations for the importation of nonconforming motor vehicles and motor vehicle engines.

[6] As discussed below, EPA is deferring its definitions of "new" locomotives and "new" engines used in a locomotive for the purpose of this regulation. EPA shall define these terms in a later rulemaking, under section 213 of the Act, specifically regulating locomotives.

[7] Section 209(a) provides, in part, ". . . No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment."

section without stating this intent explicitly.[8]

There is not a compelling policy or factual justification for defining new differently in the nonroad and motor vehicle contexts. State regulation of nonroad engines does not generally present any greater degree of disruption of the movement of products, engines or equipment between states than does regulation of motor vehicles. The comments provide little if any justification, in terms of relevant distinctions between motor vehicles and nonroad engines, to justify such a significant departure from EPA's established practice for regulating mobile sources.

The Agency's definition of new is also consistent with case law. *In Allway Taxi, Inc.* v. *City of New York*,[9] the court held that where the exercise of local police power serves the purpose of a federal act—the Clean Air Act in that case—the preemptive effect of the act should be narrowly construed. In keeping with that principle, EPA believes that section 209(e) should be construed narrowly in order to protect states' rights, particularly in an area such as public health in which states traditionally exercise control. California's nonroad regulations will serve the purpose of the federal act by improving air quality.

In *Allway Taxi*, the court discussed the federal preemption of new motor vehicles and interpreted the meaning of new motor vehicle as defined in Section 216 of the Act. The court noted that this definition "reveals a clear congressional intent to preclude states and localities from setting their own exhaust emission control standards only with respect to the manufacture and distribution of new automobiles."[10] The court stated further that the narrow purpose in the definition is reinforced by prohibiting states and localities from setting emission standards before the initial sale or registration of an automobile. Congress specifically declared that section 209 did not preempt states from regulation of the use or movement of motor vehicles after they have reached their ultimate purchasers.[11]

EPA believes that the further a state requirement is removed in time from the manufacture and distribution of new engines, the less interstate commerce is likely to be burdened. Furthermore, the legality of particular regulatory controls that a state may impose on nonroad vehicles or engines that are no longer new will depend upon the burden that such controls place on interstate commerce. In fact, the court in *Allway Taxi* stated that a state or locality is not free to impose its own emission control measures the moment after a new car is bought and registered. "That would be an obvious circumvention of the Clean Air Act and would defeat the congressional purpose of preventing obstruction to interstate commerce."[12] The court further stated that federal preemption does not, however, preclude a state from imposing its own exhaust emission control standards upon the resale or reregistration of the automobile. Furthermore, states are not precluded from setting standards for licensing of vehicles for commercial use. These types of regulations, which are more removed, "would cause only minimal interference with interstate commerce, since they would be directed primarily to intrastate activities and the burden of compliance would be on individual owners and in-state users and not on manufacturers and distributors."[13]

EPA expects that the principles articulated in *Allway Taxi* will be applied by the courts to any State adoption of in-use controls. For example, manufacturers have voiced a concern that California would attempt to impose in-use emission control measures that would apply immediately after a new vehicle or engine were purchased. As the *Allway Taxi* court said, such standards applied to almost-new vehicles would be an attempt to circumvent section 209 preemption and would obstruct interstate commerce.[14]

It should be noted that section 209(e)(2) of the Act does not prevent California or other states from regulating nonroad engines and vehicles in use.[15] EPA believes that the requirements of section 209(e)(2) apply only to new nonroad engines and vehicles. The requirements of section 209(e)(2) are only required for nonroad engines and vehicles the regulation of which has been preempted. The language of section 209(e)(2) does not state any clear preemption, either for new or in use vehicles. The only clear preemption of state regulation of nonroad engines occurs in section 209(e)(1) and section 209(a).[16] Both of these subsections are limited to new engines and vehicles. Given the general legal presumption against reading a preemption more broadly than explicitly required, as discussed in *Allway Taxi*, a preemption of state regulation of nonroad engines and vehicles in use should not be readily implied.

Another indication that section 209(e)(2) was not intended to apply to most in-use regulations of nonroad engines is the fact that neither the Senate nor the House version of the 1990 Act amendments would have preempted state regulation of anything but new nonroad engines. Neither version would have expressly preempted regulation in use. It would be unusual for a bill to come out of conference with a broader preemption than existed in either house and without any mention in the legislative history that such broader preemption had been mandated. In fact, both Senators Chafee and Baucus believed that the scope of the preemption had been narrowed from the House bill, not widened.[17]

In fact, as the legislative history indicates, it appears that Congress

[8] EPA recognizes that regulation of locomotives presents unique circumstances, including questions regarding interstate commerce, that require special attention. EPA is therefore deferring its definition of "new locomotive" and "new engine used in a locomotive" until a later rulemaking dealing specifically with regulation of locomotives.

[9] *Allway Taxi, Inc.* v. *City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

[10] *Id.* at 1124.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* EPA expects the reasoning and policy outlined above in the *Allway Taxi* discussion to apply to locomotives although its implementation is dependent upon the ultimate definition of new locomotive.

[15] In-use testing and recall programs of the type set forth in section 207 ensure compliance with standards required to be met by manufacturers at the time of certification of the engine. Because these in-use standards relate to the original manufacture of the engine and place the burden of compliance upon the manufacturer, they are deemed to be standards affecting a new motor vehicle or a new nonroad engine and thus require a waiver under the criteria of section 209(b) or 209(e)(2) respectively.

[16] Section 209(a) applies to nonroad vehicles because of the language of section 213(d) of the Act, which specifically requires that EPA's standards regulating nonroad engines and vehicles be subject to sections 206, 207, 208 and 209 of the Act, with such modifications of the applicable regulations as the Administrator deems appropriate. Thus, Congress clearly anticipated that all of section 209 would be applicable to nonroad engines. Subsections (a) through (d) of section 209 do not specifically reference nonroad engines, nor do sections 206, 207 or 208. However, the language of section 213(d) clearly is intended to apply such provisions to nonroad engines. Further indication of Congress' intent is the language of the last sentence of section 209(e)(1), which states that subsection 209(b) does not apply for purposes of subsection (e)(1). (Section 209(b) provides the procedure under which California can receive a waiver of section 209(a) preemption for motor vehicles.) This sentence would not have been necessary unless subsection 209(a) through (d) otherwise applied.

[17] Both Senators declare that state preemption is limited to new locomotives and new small farm and construction equipment. Both mention that states may still regulate other new nonroad equipment, presumedly after receiving EPA approval. Finally, each declare that states also fully retain existing authority to regulate emissions from all types of existing or in-use nonroad engines by specifying fuel quality specifications, operational modes or characteristics or measures that limit the use of nonroad engines or equipment.

intended the preemption provisions of section 209, as applied to nonroad engines, to be analogous to the preemption provisions as applied to motor vehicles, except that California cannot request any waiver of the Federal preemption of state regulation of new small farm and construction equipment and locomotives.

Further indication that section 209(e)(2) was not intended to apply to in-use regulations is the fact that, if the subsection were applied to in-use regulations, then California would be the only government (local, state or federal) that could directly set regulations for nonroad engines in use. EPA's mandate under section 213 applies only to new engines. Therefore, EPA will not promulgate standards for in-use regulation of nonroad engines under section 213, beyond in-use regulations normally associated with new certified engines (*e.g.* in-use testing and recall requirements under section 207). States other than California would not be able to regulate nonroad engines in use (*e.g.* operation controls under section 209(d)) until California regulates them and could only regulate them in a manner identical to California's regulations. Nothing in the legislative history indicates such a dramatic departure from the current ability of states and local authorities to regulate emissions of mobile sources in use. Therefore, if section 209(e)(2) is determined to apply to in-use regulations, the entire United States regulatory scheme for regulation of nonroad engines in use would be dependent on the actions of one state, California. Congress could not have meant to grant such plenary power to a single state.

This is especially true given the location-specific nature of in-use regulations. In-use regulations, such as time of use or place of use restrictions (*e.g.* high occupancy vehicle lanes) are typically very site specific. An in-use regulation suitable for California, or in part of California, may have little or no relevance or practicality to the type of in-use regulation suitable for another area. Such regulations which primarily effect local users are more appropriately controlled and implemented by local and state governments.

Moreover, section 209(d) of the Act clearly limits the preemption of state regulation in use. It states that "nothing in this part shall preclude or deny to any other State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation or movement of registered or licensed motor vehicles." As was stated above, section 209 as a whole applies equally to nonroad engines. Thus, section 209(d) should be interpreted to mean that, unless state regulation of use of nonroad engines is specifically preempted, section 209 should not be interpreted to grant any implicit preemption, except within the framework of *Allway Taxi*.

Given the language of section 209 and the lack of any express preemption, the legislative history of these provisions, and the general presumption against providing broad preemption where such preemption is not made explicit, EPA believes that it is clear that section 209(e)(2) does not apply to in use regulation of nonroad engines.

While EPA recognizes the important principle of narrowly construing the preemptive effect of the Act as explained in *Allway Taxi*, EPA also notes that certain state regulations that may be characterized as "in-use" regulations may be preempted because they are effectively regulations on the design of new engines rather than on the use of "in-use" engines. Industry has expressed concern that states might impose retrofit requirements on nonroad engines and vehicles as soon as they are introduced into commerce, or when such engines are being rebuilt, or at a date after which nonroad engines are typically rebuilt.[18] EPA recognizes that CARB does not envision a retrofit requirement and that, because of the nature of the nonroad market, it is unlikely that other states would adopt such a requirement.[19] However, given EPA's definition of new and the scope of the definition within this rulemaking, this issue could arise when other states plan their in-use emission strategy. In such a case, EPA believes that a retrofit requirement mandating a retrofit of a nonroad engine immediately after the engine is no longer new is adverse to the Congressional intent of section 209(e) and the principles laid out in *Allway Taxi*. Therefore, in this scenario, such a retrofit requirement would be deemed an in-use emission standard relating back to the original design of the new engine by the original engine manufacturer (OEM) and would be subject to the waiver criteria of section 209(e)(2). Within this same scenario, only California could adopt such a requirement and other states could only adopt California's requirement if California subsequently was granted a waiver. However, after a reasonable amount of time has passed and the engine is no longer new (most likely when an engine is being rebuilt), modest retrofit requirements would most likely not be deemed to significantly affect the OEM and thus such requirements would not be subject to subsection 209(e)(2). In this second scenario, the modest retrofit requirements would still be subject to challenge in court under the *Allway Taxi* criteria.[20]

Therefore, the Agency has determined that nonroad engines and nonroad vehicles will be "new" for purposes of the Act until the equitable or legal title passes to the ultimate purchaser, or if title passage does not occur, then the engine or vehicle will be new until placed into service.

D. Definition of Farm Equipment

The NPRM defined "farm equipment" to mean any internal combustion engine-powered machine primarily used in the commercial production and/or harvesting of food, fiber, wood, or commercial organic products.

Several manufacturers and trade groups were concerned that the definition was too narrow. These commenters thought it necessary to change the words "primarily used in" to "designed for use in". They asserted that the designer is the only one who knows what tasks a particular machine was meant to perform. They also thought that the definition should include engines used in post-harvest processing and storage that take place on the farm (the U.S. Department of Agriculture had a similar comment) and transportation which takes place on the farm. Caterpillar, Inc., PPEMA, EMI and others were concerned that the word "commercial" might exclude equipment used in the public sector (*e.g.*, state agricultural programs) or on cooperative or communal farms.

CARB, SDAPCB, and MECA, on the other hand, thought the definition was too broad. CARB and SDAPCB believed that the word "commercial" was not only necessary but needed to be defined. Suggestions for the definition

[18] *See* Oral Statement of the Engine Manufacturers Association, Docket entry IV–F–7, which states "The ultimate purchaser must have the assurance that the engine . . . she might purchase, and which properly meets EPA requirements—is 'good' until that engine is ready to be rebuilt. No state should be allowed to impose retrofit standards on engines which otherwise conform to EPA requirements."

[19] *See* Letter from Mr. Cackette, CARB to Mr. Mandel, EMA, dated July 20, 1993, Docket entry IV–I–55.

[20] EPA's definition of "new" does not present a problem for engines or equipment that do not sell relatively quickly (*e.g.*, within a year of being made) in California. If California's regulation set standards applicable to "new" engines, *i.e.* as of the date title passed, regardless of when the engine was produced, then an engine manufactured in 1990 but not sold until 1994 would be subject to 1994 emission standards. This problem is avoided since California's Utility Engine Rule ties the date of manufacture to the standard, therefore a 1990 engine would be subject to a 1990 standard and a 1994 engine subject to a 1994 standard.

were supplied. MECA suggested that the definition should be site and use specific. CARB also thought the wording should be changed to "production *and* harvesting" in place of *"and/or"*. CARB provided their characterization of typical farm equipment (self-propelled and operated independent of other equipment) and a partial list of pieces of equipment that should not be included under the definition of farm equipment (utility vehicles used by a farmer to check his crops or portable power units used to generate electricity for another piece of equipment).

EPA does not believe that "designed for use in" should be added to the definition of nonroad engine. While a machine's designer may have designed the machine with certain tasks in mind, EPA believes that the intention of the designer is less important than the actual use to which the equipment is put. A machine may have been designed to assist farmers in some process, but if more than 50 percent of these machines are now used by homeowners, it may fairly be considered other than farm equipment. Requiring that equipment "be designed for use" on a farm would also leave the categorization of farm equipment entirely up to the manufacturers who might, in turn, choose to categorize products as farm equipment merely to avoid state regulation. Additionally, although requested, commenters have not provided examples of where the absence of "designed for" in the definition would make a difference in the preemption of some engines.

EPA also did not agree with CARB's description of farm and non-farm equipment because it did not address the machines which are likely to be used in both situations. Classifying equipment that is uniquely farm or non-farm related is straightforward. The more difficult equipment to characterize is multiple use equipment. Whether and when such equipment is preempted from state regulation is addressed under Section G—the Application of Definitions, Primary Use Test section of this rule.

CARB's further comment, that EPA should require that equipment be involved in both production and harvesting in order to be considered farm equipment, does not account for the specialization of farm machinery. Most farm equipment is used for a specific job: cultivating, planting, harvesting, etc., rather than for tasks involving both production and harvesting. The impetus for CARB's comment is the desire to separate the harvest of tree farms from that of natural forests which might contain no element of production and to ensure that landscaping and groundskeeping are not considered farming.

Under EPA's definition, however, harvesting trees from a natural forest is considered farming. Plant nurseries would also be considered farming, as plants are a product that is grown and gathered. The American Association of Nurserymen supported the proposed definition. At the same time, CARB's concern that landscaping and groundskeeping might be considered farming is alleviated. Although cutting and trimming are involved in these operations, production and harvesting are not, so equipment used would not be farm equipment unless used primarily on farms. (See Scope of Preemption section)

MECA suggested that the definition be changed to ". . . used *on a farm* . . ." to require site specificity. While most of the preempted equipment is operated on farms, EPA has not included this suggestion out of concern that it may create ambiguity for some operations, like plant nurseries.

The SDAPCB was also concerned that the phrase "commercial organic products" would allow some chemical and man-made products to be considered farm produce and thus their associated processing equipment to be considered farm equipment. The list of acceptable farm products is broad and may include items not generally considered farm products. However, the equipment used in any processing after the harvest is not considered farm equipment. Thus, equipment used to make chemical or man-made products would not be considered farm equipment.

As noted in the NPRM, EPA intended harvesting to be the last operation in the farming process to be considered "farming" and, therefore, equipment that performed any function later in the process, *i.e.*, processing or storing, would not be preempted. However, the U.S. Department of Agriculture (USDA) commented that all activities associated with planting, harvesting and on-farm processing of agricultural products for use on the farm should be considered farm activities. The Nisei Farmers League had similar comments with respect to on-farm activities although they did not limit the operations to those preparing products for further use on the farm. Therefore, EPA decided that equipment used in certain post-harvesting operations will be accepted within the preemption category when they relate directly to the continued operation of the farm. Those activities include such things as grinding, drying, and storage operations of products usually used in the future on the farm. Examples of crops subject to these activities are hay, silage, and other animal feed. For less traditional agricultural operations such as nurseries, equipment used in similar operations will also be considered farm equipment. Machinery that is used on crops for continued use in that agricultural operation, such as conveyors (hay bale loaders) and ensiles, will be considered farm equipment. Post-harvest processing of crops in preparation for sale will not be considered farm operations.

SDAPCB expressed the concern that the definition is so broad that it could limit the state's ability to regulate stationary equipment used in the refining, handling, cleaning or processing of food products. We believe that the above discussion of what post-harvesting processing may still be considered farming should alleviate that concern.

EMI supplied EPA with a proposed definition which many others supported.[21] EPA's definition is nearly as inclusive as EMI's definition. One of the differences between the two was the inclusion in the EMI definition of storage and processing activities of the harvested product. EPA's resolution of how such activities should be treated is discussed above. Another difference was EMI's inclusion of off-road transportation. We do not believe that such nonroad vehicles should usually be considered farm equipment as they are primarily used to transport persons or property on or off farms and are not unique to farms. EMI's definition also could include vehicles which are frequently used for property maintenance of a sort which is also not unique to farms. EMI noted at the public hearing that under its definition such equipment as lawn mowers would be included.[22] Such a definition of farm equipment is overly broad.

EPA has decided to define "commercial" in the final rule as "an activity engaged in as a vocation."

[21] EMI proposed that "farm equipment or vehicle" means any engine-powered machine, device, apparatus, or movable stationary source which is self-propelled or transportable and which is designed by the manufacturer for use, or is used, to supply mechanical, hydraulic, pneumatic or electric power, for: preparation for production, production, harvesting, processing, storage or off-road transportation of food, fiber, animal feed, other organic material or any other agricultural product or commodity, or any product used in an agricultural operation; handling of products or water related to the care of animals; movement of animals; or operation or maintenance of a farmstead, ranch or logging operation.

[22] *See* Transcript of Sept. 20,1991 Public Hearing regarding Authorization of Nonroad Standards in California at page 139, line 5.

Farming does not have to be the sole or primary vocation. If a person engages in vocations in addition to farming, farming would still be a vocation. EPA believes that a dollar threshold would not serve the purpose of distinguishing residential from commercial use. EPA defined farm equipment as equipment used for "commercial" purposes to prevent the inclusion of such activities as backyard gardening in the definition of farming. There is no reason to believe that Congress meant to include equipment used in these operations which are not conventionally considered to be farms. Thus, equipment used on an agricultural school farm would fall under this definition of commercial because it is equipment used to educate students to farm as a vocation. Also, equipment used on farms that grow crops only for livestock would be considered to be farm equipment. Finally, equipment would be farm equipment if found on "subsistence" farms, defined by Webster's New Collegiate Dictionary as farming that provides all or almost all the goods required by the farm family usually without any significant surplus for sale. EMA and PPEMA's suggestion that any piece of equipment that is used on a farm is farm equipment would preclude from potential CARB regulation many types of machines that are incidental to living on a farm and not used in operations normally associated with growing or harvesting agricultural products. An example would be the lawn mowers that EMI said should be deemed farm equipment.

In the final rule, farm equipment is defined as any internal combustion engine-powered machine primarily used in the commercial production and/or harvesting of food, fiber, wood, or commercial organic products or for the processing of such products for further use on the farm.

E. Definition of Construction Equipment

The NPRM stated that "construction equipment" means any internal combustion engine-powered machine primarily used on commercial construction sites.

Many of the comments concerning this definition were similar to those comments provided regarding the definition of farm equipment. Several manufacturers and trade groups were concerned that the definition was too narrow. They thought it necessary to change the words "primarily used in" to "designed for use in." Caterpillar, the Construction Industry Manufacturer's Association (CIMA) and others were concerned that the word "commercial" might exclude equipment used on public works projects or in residential construction. The EPA exclusion of mining equipment from this preempted category drew unfavorable comments from EMA, EMI, CIMA, and the American Mining Congress (AMC). The American Association of Nurserymen (AAN) requested that EPA explicitly recognize that landscape contracting involves earthmoving and is thus construction.

CARB, SDAPCB and MECA, on the other hand, thought the definition was too broad. CARB and SDAPCB recommended that all auxiliary equipment such as compressors and pumps be excluded from preemption. Both believed that the phrase "commercial construction sites" be defined. MECA suggested that the definition should be site and use specific. Both CARB and SDAPCB approved of our mining equipment exclusion.

EPA's response to the comments that the phrase "designed for" should be part of the construction equipment definition is identical to the Agency's response to the same comments under the Definition of "farm equipment" section of this rule. Please refer to that section for further discussion.

The comments on the use of the word "commercial" may be approached in a manner similar to the way they were addressed under the definition of "farm equipment." EPA believes that defining "commercial" in the final rule as "an activity engaged in as a vocation" is as appropriate in the context of construction equipment as it is in the context of farm equipment. "Commercial" in the construction equipment definition is meant to distinguish equipment that homeowners typically use to perform repairs on their own property from equipment typically used by contractors. Construction of public works projects is "commercial" under this definition.

MECA suggested that the definition be changed to ". . . used *in construction and located* on . . ." to specify the activity involved. This is a reasonable suggestion. EPA believes that including these recommended words in the definition will make it clear that the function of machinery is as important as its location on a site on which construction occurs.

EMA, EMI, CIMA, AMC and others pointed out that mining operations (surface mining) share with construction sites the use of many of the same machines. While this may be true, Congress expressed no intent to preempt from state regulation equipment used in mining operations. According to Webster's Third New International Dictionary (1971 unabridged) construction is "the act of putting parts together to form a complete integrated object." Although EPA's definition includes operations such as demolition and painting which take place outside the actual structural fabrication, the definition still would not include mining, which Webster's defines as "getting ore, metals, coal or precious stones out of the earth." These are not construction activities. Additionally, underground mining usually employs uniquely designed equipment unlike equipment found on a construction site. Surface mining, while sharing some equipment, is a separate activity not associated with construction. The regulation of equipment, however, that is used in surface mining and is also primarily used in construction activities, as defined in this rule, would be preempted.

As discussed in the NPRM, a number of diverse activities take place on a construction site. Earthmoving is one such activity, and thus, landscape contracting could use construction equipment as AAN notes. AAN made no mention of the specific earthmoving equipment in question; thus, the primary use test (See Scope of Preemption section) must be applied to such machinery. Groundskeeping is not a construction activity. AAN did state its support of EPA's definition of construction equipment.

Ingersoll-Rand thought that the words "commercial" and "primary use" should be deleted and that the definitions of farm and construction equipment should be broadened to include any machine that includes an engine belonging to an engine family which is used in construction equipment. The issue of commercial is considered above. Ingersoll-Rand's use of the engine family concept is addressed, as is the primary use issue, in the Application of Definitions, Primary Use Test section.

SDAPCB and CARB thought that the definition should exclude ancillary equipment such as electrical generators and air compressors. CARB argued that these machines are not specifically construction machines in that they perform the same functions in other types of applications. While this is true, such equipment may be employed in construction activity; the question then becomes one of primary use, which is discussed in the Application of Definitions, Primary Use Test section.

For the reasons discussed above, construction equipment is defined in the final rule as any internal combustion engine-powered machine primarily used

in construction and located on commercial construction sites.

F. Definition of Locomotive

The NPRM defined locomotive as a self-propelled piece of on-track equipment (other than equipment designed for operation both on highways and rails, specialized maintenance equipment, and other similar equipment) designed for moving other equipment or carrying freight or passenger traffic or both.

EMA noted a difference between the NPRM definition and the definition given in the Locomotive Inspection Act (LIA) upon which the EPA definition was based, but did not recommend EPA use the LIA definition in the definition EMA provided. The only difference between the EPA definition and the LIA definition is that the LIA definition of locomotive includes a piece of equipment without propelling motors but with one or more control stands. This item was not included by EPA since if it has no propelling motors it will not be of concern for purposes of engine emissions regulations. It is noted that neither the Association of American Railroads (AAR) nor any railroad companies that commented on the NPRM, such as Union Pacific and Southern Pacific, had any specific comments on the definition of locomotive.

EMA provided definitions for "locomotive" and "locomotive engine."[23] Under this definition, the regulation of any engine mounted on a locomotive (such as an engine driving a crane or winch) would be preempted. The dictionary definition of "locomotive" is a "self-propelled vehicle, usually diesel or electric, that travels on rails and moves railroad cars."[24]

EMA's definition of locomotive engine goes beyond the specific purpose of locomotion to include any other engine that might be placed on a locomotive. EPA believes that the term "locomotive engine" is limited to the engine used to propel the locomotive and other railroad cars. However, EPA does believe that the term "engines used in locomotives," as found in section 209(e)(1)(B), can be defined to include other engines which are mounted on a locomotive regardless of whether they are used for purposes of self-propulsion. EPA notes that under this definitional framework the "locomotive" is only that piece of on-track equipment which is self-propelling and is designed for moving other cars containing equipment, freight, or passengers. "Engines used in locomotives" thus includes an engine placed in the locomotive to propel the train and also includes other engines mounted on the locomotive for auxiliary power generation for the train, but does not include engines mounted on the train elsewhere than the locomotive. An engine providing power for a crane or winch, for example, would only be considered preempted from state regulation (if it otherwise met the requirements for "new") as "an engine used in [a] locomotive" if such engine were mounted on the locomotive. EPA believes these definitions reflect the intent of Congress to reduce the burden on interstate commerce for the railroad industry, and address EMA's concerns regarding auxiliary engines.[25]

Regulation of auxiliary engines whose primary function are not for propulsion is addressed by EPA in its final regulation for nonroad engines 37 kilowatt (50 hp) and above under section 213 of the Act.[26]

EPA has stricken the word "carrying" from the definition of locomotive. This was done to avoid implying that any persons or property that were moved by the engine had to be located directly on the locomotive. The word "moving" in the definition is all that is needed to give the correct meaning.

For the final rule, EPA has decided that a "locomotive" means a self-propelled piece of on-track equipment (other than equipment designed for operation both on highways and rails, specialized maintenance equipment, and other similar equipment) designed for moving other equipment, freight or passenger traffic. EPA has also decided that the term "engines used in locomotives" means either an engine placed in the locomotive to move other equipment, freight, or passenger traffic, or an engine mounted on the locomotive to provide auxiliary power.

G. Application of Definitions; Primary Use Test

1. Introduction

EPA is defining farm equipment as any internal combustion engine-powered machine primarily used in the commercial production and/or harvesting of food, fiber, wood, or commercial organic products or for the processing of such products for further use on the farm. EPA is defining construction equipment as any internal combustion engine-powered machine primarily used in construction and located on commercial construction sites. Many types of equipment are used almost exclusively for farming and construction (*e.g.*, tractors and bulldozers). In the case of such equipment, the applicability of EPA's definition is clear: they are farm or construction equipment and thus preempted from state regulation. Other types of equipment, however, are used not only for farming or construction, but for other purposes as well (*e.g.*, pumps used for irrigation and swimming pools). The issue thus arises whether or not such multi-purpose equipment should be considered farm or construction equipment and thus preempted from state regulation.

2. EPA's Proposal

In the NPRM, EPA proposed a "primary use" test to assess whether state regulation of multiple use equipment would be preempted. EPA proposed that in order for state regulation to be preempted, equipment must be "primarily used"—used 51 percent—as farm or construction equipment. Under this test, for example, a compressor used 51 percent in farming or construction applications would be preempted from state regulation. EPA proposed 51 percent as a reasonable use cut-off point because it corresponds to a bare "majority". EPA believed that the preempted category would be unreasonably expanded if state regulation could be preempted simply because a small fraction of such equipment was used in farm or construction applications.

3. Comments on and Alternatives to EPA's Proposal

During the comment period following the hearing EPA received comments from industry and CARB opposing the primary use test. EMI, EMA, PPEMA, Industrial Truck Association (ITA), Construction Industry Air Quality Coalition (CIAQC), and Ingersoll-Rand Company stated that the primary use test is unauthorized and should not be employed. They stated that the plain meaning of the preemption provision does not permit EPA to apply a percentage test to determine if equipment is farm or construction equipment. Congress, they contended, meant to preempt state regulation of all nonroad engines used in farm or construction equipment, even if only a small fraction of the equipment is

[23] EMA recommended the following definitions: "Locomotive" means a self-propelled piece of on-track railroad equipment (other than equipment designed for operation both on-highway and on-track) and "Locomotive engine" means an engine included in a locomotive. *See* Statement of Engine Manufacturers Association, Docket entry IV–G–19.

[24] Websters II, New Riverside University Dictionary, 1988.

[25] *See* Letter from Glenn Keller, EMA to Joanne Goldhand, EPA, Docket entry IV–I–54.

[26] 59 FR 31306, June 17, 1994.

represented in these preempted categories. CIMA commented that the proposed test would be unworkable because the data on which to base a primary use finding are unavailable, and Deere and Company and others similarly stated that accurate data cannot be obtained, in part because of the rental market.

On the other side of the issue, CARB argued that the 51 percent primary use test is contrary to Congressional intent. CARB noted that it is unlikely that Congress intended to so limit California's authority to control emissions from nonroad sources given the broad waiver of federal preemption it provides California in the area of motor vehicle emission control.

CARB initially supported a position that equipment should be defined as farm or construction equipment only if more than 75 percent of the equipment is used in farming or construction. CARB noted, in its comments supporting a 75 percent cutoff, that this would ensure that state regulation would be preempted only for equipment primarily used on farm or construction sites. Commenters submitted alternative proposals.

EMA and the Outdoor Power Equipment Institute (OPEI) proposed that EPA should define the scope of preemption in terms of the primary use of the engine family, not the equipment. EMA proposed that the Agency consider preempting for state regulation any engine line "used in" farm or construction equipment regardless of the extent which the engine line is used in other types of equipment. CARB and MECA both commented that only regulation of the individual engines actually used in farm or construction equipment should be preempted. CARB also proposed that preemption apply only to regulation of engines exclusively designed for and used in the farm and construction industries. Failing that, both CARB and MECA believed that the 51 percent test for determining how equipment was primarily used was too low. CARB recommended that state regulation of multiple-use equipment be preempted only if more than 75 percent of the equipment is used in farming or construction. CARB noted that this would ensure that any preempted equipment was primarily used on farms or at construction sites.

PPEMA proposed that EPA use a different test to determine whether multi-use equipment should be considered farm or construction equipment for purposes of determining the scope of federal preemption. This test would be that federal preemption applies whenever equipment is used in more than *de minimis* amounts for farming or construction, and such equipment is necessary to perform farming and construction activities. PPEMA did not state any criteria to be used in determining such a "*de minimis*" amount or determining what "necessary" is. PPEMA supported this proposal with several arguments.

First, PPEMA argued that a *de minimis* test follows the plain language of the statute. PPEMA argued that the "plain language" of the statute does not include modifiers such as "primarily" or "predominantly" and thus does not in any way imply that Congress intended for EPA to apply a percentage test to determine if equipment was used for farming or construction. PPEMA contended that Congress intended to preempt state regulation of all nonroad engines used in farm and construction equipment.

Second, PPEMA argued that Congress explicitly limited the scope of preemption by specifying that preemption would apply to regulation of engines used in farm and construction equipment smaller than 175 horsepower. Thus, according to PPEMA, there is no need for EPA to clarify the scope of preemption further.

PPEMA's final argument is that a *de minimis* test would not unduly expand the scope of federal preemption. Equipment would be preempted only if it were found in more than *de minimis* amounts and were necessary to the performance of farm and construction operations.

4. Response to Comments

a. *Primary Use Test*

EPA has decided to apply the primary use test to determine which multiple-use equipment will be considered farm or construction equipment and thus preempted from state regulation. As explained in the NPRM, the "primary use" test is the most appropriate method for classifying (as farm or construction, or other) multiple use equipment. Industry commenters who believe EPA must consider multiple-use equipment to be farm or construction equipment beg the question of what is farm and construction equipment. Some industry commenters stated that EPA could not use the primary use test because the language of section 209(e)(1) refers to new engines which are used in construction or farm equipment or vehicles, not to engines which are "primarily" used in construction of farm equipment or vehicles. These comments miss the point of the primary use test. The test is not used to define "used in", but is used to define "construction equipment" and "farm equipment". In order to identify an engine used in farm or construction equipment, EPA must first determine whether a piece of equipment is farm or construction equipment. Equipment used only incidentally (perhaps 10 percent) in farm or construction applications is not fairly considered to be farm or construction equipment. A type of equipment such as a pump, for example, is not farm equipment merely because it is used on a handful of farms and otherwise used exclusively in residential settings. Therefore, the engine used in this type of equipment is not an engine used in farm or construction equipment and, therefore, regulation of that engine type is not preempted.

EPA believes that the terms "farm equipment" and "construction equipment" are best identified by referring to the general use of the equipment. EPA does not believe that the *de minimis* approach suggested by PPEMA is an appropriate approach to defining these terms. EPA does not believe that a piece of equipment primarily used in non-construction or non-farming activities should be defined as construction or farm equipment merely because it is or could be used for some farm or construction applications. Such a definition would inappropriately expand the preempted categories.

Similarly, EPA does not agree with CARB's initial proposal that equipment should be defined as farm and construction equipment only if more than 75 percent of the equipment is used in farm or construction. EPA believes that the 51 percent cutoff is a better measure of whether or not a piece of equipment is farm or construction equipment, especially given Congress's apparent intent to protect new farm and construction equipment from state regulation. If equipment is used more than half the time in farm or construction applications, then it should be considered farm or construction equipment even if it has some applications outside of the farm or construction area. A 75 percent threshold would be inappropriate because equipment that may be used regularly and predominantly in farm and construction applications could still be used enough in other applications to prevent a 75 percent threshold to be met. EPA believes its final decision on this issue will not unduly limit California's authority to control emissions from nonroad sources.

Thus, EPA has decided to retain the 51 percent criterion for the primary use determination. It believes this criterion is in keeping with Congress's implicit goal of striking a balance between the

competing interests of national uniformity of regulatory requirements and state control over sources of in-state pollution. This test still permits California to regulate new engines that are installed in machines used in farms or at construction sites if most of such engines are in equipment not used in those situations.

Since the frequency with which multiple use equipment is used on farms or at construction sites ranges from "almost never" to "every day", it is clear that a line must be drawn somewhere along this continuum. Many comments were received addressing the selection of 51 percent as the primary use cut-off point. EPA selected it because it corresponds to a bare "majority".

As noted previously, PPEMA would like to see this limit lowered to *de minimis* amounts. This would mean that equipment used more often than this small amount in preempted categories would be judged farm or construction equipment and thus its regulation would be preempted. Therefore, under such a limit, items such as lawn mowers and hedge trimmers could be judged farm or construction equipment. EPA believes that this result, and such a low threshold by which a lawn mower could be considered a piece of farm or construction equipment, is not consistent with Congressional intent of preempting state regulation of new farm and construction equipment.

No matter what number is chosen as the cutoff there will always be some categories of equipment that fall just above or just below the line. No commenter has made a strong case for why EPA should select a cut-off point other than the 51 percent cut-off. EPA notes CARB's most recent submittal, dated July 20, 1993,[27] (see discussion below) which recognizes the use of a primary use test by EPA.

EPA believes the primary use test is in keeping with Congress' implicit goal of striking a balance between the competing interests of national uniformity of regulatory requirements and state control over sources of in-state pollution. Under this test, equipment used for a majority of the time in farming and construction is preempted from California regulation. Conversely, equipment used primarily by consumers and in consumer settings would more than likely be subject to California regulation since their use in farming or construction would most likely not meet the primary use test. This test, therefore, preempts California from regulating new engines that are installed in any equipment which is primarily used in the commercial production and/or harvesting of food, fiber, wood, or commercial organic products or for the processing of such products for further use on the farm. This test also preempts California from regulating new engines that are installed in equipment which is primarily used in construction and located on commercial construction sites.

EPA's application of the primary use test in this rule is similar to the proposed application of the 51 percent primary use test found in the notice of proposed rulemaking. That is, EPA believes that it is appropriate for CARB to make a preliminary determination of primary use for multiple-use equipment that is in question in a CARB regulation such as the Utility Engine Rule. (EPA's discussion of CARB's role in such determinations is found below in Section K). CARB will be required to come forward with evidence, data, agreements with industry, and analysis to support a finding that a category or subcategory of equipment is primarily not used in farm or construction applications and is thus subject to state regulation.

CARB and the major industry commenters had a series of meetings during which they discussed whether various types of equipment should fall into a preempted category or a non-preempted category should EPA adopt its proposed primary use test based on 51 percent usage. As a result, on July 20, 1993, EPA received a letter from CARB explaining the process by which it and major industry commenters[28] reached agreement on lists of equipment which would or would not be considered as farm or construction equipment based on the primary use test as set out in the Notice of Proposed Rulemaking for this section 209(e) rule.[29] CARB noted that EMI had not reached agreement with the primary use test but apparently was in agreement with the categorized lists of equipment and this seems to be supported by EMI's letter to CARB during this time period.[30]

EPA recognizes the significance of these lists for several reasons. The lists are intended to be exhaustive of all equipment currently in existence, according to CARB, and eliminates uncertainty regarding the categorization, as farm or construction or other, of any equipment currently in production. For any currently existing equipment under 25 horsepower that is not considered on the list, EPA believes manufacturers will have the ability to petition CARB for the appropriate categorization. Further, the lists of equipment are generic such that any modifications to existing equipment types would fall into existing categories, with appropriate review by CARB, and thereby reduce any burden on manufacturers to produce large amounts of new information to support their position that such modified equipment is farm or construction.

For newly developed equipment, which is not a modification of existing equipment or included on the lists, CARB and manufacturers will classify it as preempted or non-preempted based upon, among other things, a description of the equipment, its intended application, and projected sales market. EPA believes the classification process will be clear and predictable and will not require substantial new information. It is anticipated that CARB and the manufacturers will continue to work together to minimize the information gathering burden for the small number of newly developed types of equipment.

The existence of these lists is noted here merely as an example of how CARB and industry foresee the future categorization of nonroad equipment. As CARB noted in its July 20, 1993 letter, EPA maintains its independent authority under section 209(e) to review each separate CARB nonroad authorization request and to determine, by examining data as explained in section II(K) of this preamble, whether such equipment is indeed farm or construction equipment.

b. *Subcategorization*

The USDA commented that some of California's suggested categories might be too inclusive because they were not subcategorized as to professional or non-professional use, particularly chain saws.

As noted in the NPRM, unless there is a very clear delineation of types of equipment within a category, all similar pieces of equipment could remain together in one group rather than being split into multiple sub-groups. Not every product may be susceptible to subcategorization because there may not be clear delineations defining types of equipment. However, in cases when

[27] *See* Letter from Tom Cackette, CARB to Richard Wilson, EPA, Docket entry IV-I-52. This letter discusses an agreement between CARB and certain industry representatives regarding whether certain equipment types should or should not be considered farm or construction equipment, subject to EPA's review.

[28] The major industry groups that met with CARB included the Engine Manufacturers Association, the Portable Power Equipment Manufacturers Association, the Industrial Truck Association, the Outdoor Power Equipment Institute, the Construction Industry Manufacturers Association, and the Equipment Manufacturers Institute (EMI).

[29] *See* Letter from Tom Cackette, CARB to Richard Wilson, EPA, Docket entry IV-I-52.

[30] *See* Letter from Gary Baise, Counsel to EMI to Mike Kenny, CARB, Docket entry IV-I-53.

subcategories of equipment can be identified they should be separately grouped and not subjected to state regulation. It would be inappropriate for California to regulate a subcategory of multiple-use equipment which is primarily used as farm or construction equipment. In preparing its use determination California should look carefully at whether there are subcategories of equipment that are primarily used on farms or construction sites. California should not aggregate a group of equipment that can be subcategorized that is primarily used as farm or construction equipment with subcategories that are not used as farm or construction equipment in order to extend its reach into federally preempted categories. When commenters bring to EPA's attention a product that is primarily used as farm or construction equipment but is also used in other applications, EPA will carefully review California's categorization determination as part of its authorization process.

c. *Data for use determination*

The preamble to the NPRM provided that in determining primary use California would consider national sales data to demonstrate whether CARB's various equipment categories were or were not preempted. PPEMA, ITA and others commented that sales data do not correlate with actual use and that hours-of-use would be a better measure. EMI, CIMA and others were concerned with the year-to-year variability of sales, while OPEI and Caterpillar stated that accurate sales data were not available.

CARB suggested that, if a primary use test were used, it be permitted to apply the best data available in making its determination and requested that national sales data, mentioned in the NPRM, not be mandated. EPA agrees that California should employ the most relevant information and data at hand to make its determination of primary use. The classes of equipment in the Utility Engine Rule regulation and in any potential future California regulations that may employ a usage test are so varied and unique that EPA is not in a position to specify the type of data to be used. Therefore, EPA is not mandating CARB to use any specific type of data, e.g. national sales data; however, California should select the appropriate data base keeping in mind that EPA will review any use determination as part of an authorization request by California under the preponderance of the evidence standard of review. (See discussion in Section K below regarding this standard of proof.)

d. *Equipment versus engine line*

The primary use test described in the NPRM is based upon an assessment of whether multiple use equipment is primarily used as farm or construction equipment. Several commenters suggested that the preemption should be based instead on a primary use test of an engine manufacturer's engine line. (An engine line is all the engines produced by a manufacturer with many common characteristics such as number of cylinders, displacement, calibration, etc.) Two rules would be followed under their suggested system: (1) state regulation of all engines used in farm and construction equipment would be preempted, and (2) state regulation of all engines from an *engine line* which is primarily used in farm and construction equipment (no matter what else they are installed in) would be preempted.

Primary use would mean 51% under the engine line test also. Under this suggested system, in a situation in which 70 percent of an engine line went to farm and construction equipment and 30 percent went to other equipment, regulation of the entire engine line would be preempted. Thus state control of the 30 percent fraction of the engines would be preempted even though they would be installed in equipment that could not be considered farm or construction equipment and that Congress intended the state be allowed to regulate. If the fractions were reversed, state control of the 30 percent fraction would be preempted since it was used in farm and construction equipment while state regulation of the 70 percent fraction would not be preempted and would be subject to state requirements.

The commenters suggest that the engine-line test is preferable because engines are generally designed by engine-line, not by equipment. Under the equipment-based test, engine manufacturers would have to divide their engine lines based on the use of the engines in equipment. Thus, the exact same engines might have to be divided into two families.

In the equipment application method, if an engine manufacturer has an engine line where 70 percent of the engines go to farm and construction equipment (and their regulation would therefore be preempted) and 30 percent go to other equipment (and state regulation would not be preempted), the manufacturer must decide whether to split the engine line and manufacture the 30 percent portion of the engines to meet California's standards (and label them as such) or discontinue the production of those engines for California.[31] If the example is reversed with 70 percent of the engines going into other equipment and 30 percent going into farm and construction, the manufacturer could decide to produce and certify its entire line to meet California's standards or to split its engine line into two separate engine types—one certified for sale in California and one not. Therefore, under the equipment-based test, equipment manufacturers would have to maintain an awareness of their California and non-California markets and specify the number of engines of each type they will need.

However, engine manufacturers may also have to divide their engine lines under their proposed engine-line approach. If 30 percent of an engine line is used in farm and construction equipment and the remainder is used in non-preempted equipment, then under the commenters' plan, the engine line would be split, because 30 percent of the engine line would be preempted but the remainder would be subject to state regulation. Therefore, the problem the commenters sought to avoid would not be avoided.

On the other hand, there are several advantages of an equipment-based determination. The only requirement of an equipment-based determination would be to develop two lists—one of farm and construction equipment and one of other equipment (non-farm and non-construction equipment). With these two lists the equipment manufacturer knows the type of engine it needs in each piece of equipment produced—either a preempted (farm or construction) engine or an engine that complies with California emission requirements if California has such requirements.

Enforcement under the equipment-based method would be relatively simple. An inspector would only have to determine whether a piece of equipment was farm or construction equipment, or an other type of equipment. If it is farm or construction equipment, nothing more need be done, as the piece of equipment would not be subject to state regulation. If it is not farm or construction equipment, the inspector need only look for the required CARB label if there are California standards for that type of equipment. Enforcement would require additional steps if an engine line based system were used: for example, the inspector would have to determine whether a non-preempted piece of

[31] This discussion presumes that California will actually promulgate regulations for the engine line in question.

equipment contained an engine from a manufacturer who claimed its entire engine line as preempt from state regulation.

If the primary use determination were based on an engine line, EPA would have several concerns. As with the equipment based method, two equipment lists would still be developed, but additionally each engine line for every engine manufacturer must be determined to be preempted or not after gathering data on whether the engines were now installed in farm or construction equipment. This would add another layer of calculations to the process. According to many of those who commented at the public hearing, engine destination data are difficult to obtain. In a case where most engines in an engine line are used in non-preempted equipment, the engine line would be split, causing the same burden as manufacturers stated would occur in the equipment-based method and which they wanted to avoid. Additionally, this method would give a competitive advantage to manufacturers who now make engine lines which are primarily used in farm and construction equipment. Such manufacturers, who have engines for which state regulation is preempted, would enjoy an advantage over a manufacturer whose engines are not preempted and therefore must meet California's emission standards. Ford Motor Company recognized this issue and expressed its concerns and disagreement with EMA on this issue.

EPA is also concerned that the commenters' method would be contrary to section 209 in that it is overinclusive and inconsistent in its definition of farm and construction equipment. Under the commenters' method, if 70 percent of the engines in an engine line were used in farm and construction equipment and 30 percent were used in other equipment, the entire engine line would be preempted. Thus, the regulation of some engines would be preempted even though they are not used in farm or construction equipment. This would create a preemption greater than that contemplated by the statute. Moreover, the method is inconsistent in application: if 70 percent of the engines in an engine line were used in non-preempted equipment but the remainder were used in farm or construction equipment, California could only regulate 70 percent of the engines, not 100 percent. Therefore, the method gives engine manufacturers the benefit of full preemption when the majority of the engines are preempted, but it does not allow full California regulation if the majority of the engines are not preempted. This inconsistency appears arbitrary and could result in higher emissions (as noted by Ford Motor Company) because California would be precluded from regulating engines that it would otherwise be able to regulate under a more evenhanded approach.

Furthermore, this approach does not solve the question that is at the heart of the "primary use" issue: *i.e.*, when should a multiple use piece of equipment be defined as farm and/or construction equipment? In order to determine whether an engine line is being used 30 percent in farm and construction equipment or 70 percent in farm or construction equipment, one still must know what is meant by farm and construction equipment. This approach, taken by itself, does not provide an answer. Finally, manufacturers did not explain how a newly developed engine line would be judged (preempted or non-preempted) since there would be no existing data upon which to base a determination.

EMA stated that the equipment-based method would result in higher certification costs than the engine-line method. EPA believes that under both methods, engine manufacturers could face additional costs for any engine they wished to certify for sale in California. These costs would include research and development expenses to develop a cleaner engine, and administrative and testing expenses associated with the state certification process. Those engine manufacturers who chose to compete in the California market would face higher certification costs than those who did not, but there should be little difference in certification costs between the two methods.

In the final rule, rather than use the engine-line method, EPA is requiring a primary use test that preempts California from regulating new engines that are installed in equipment that is primarily used in farming or construction settings.

H. Labeling Requirement

The NPRM would require engine manufacturers to label new engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower. The label would state to which standard or standards (California, Federal, or both) the engine is certified.

Most commenters opposed the labeling requirement. CARB stated that it intended to require labels on engines that comply with California emission regulations. CARB, EMI, and EMA agreed that a federal labeling requirement was not appropriate until EPA determined under section 213 whether federal standards were necessary. In fact, EMI argued that authority for labeling lies in section 213, not section 209(e).

EPA has decided to not implement a labeling requirement under section 209(e). It should be noted that the regulation setting forth federal nonroad standards under section 213 contains a labeling requirement.[32]

I. Authorization Criteria and Procedures

In the NPRM, EPA noted that sections 209(b) and (e) are in many respects alike and in those respects should be similarly interpreted. One difference between the two provisions that the Agency identified, however, was an apparent difference in the sequence of California and EPA actions. In this regard, EPA focused on the following language of section 209(b):

> (b)(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which *has adopted standards* . . . for the control of emissions from new motor vehicles or new motor vehicle engines *prior to March 30, 1966*. . . . (Emphasis added.)

EPA interpreted the phrase "has adopted" to mean that the Administrator could waive the prohibition of section 209(a) after a state has adopted standards. By contrast, section 209(e)(2) provides that "the Administrator shall . . . authorize California to adopt and enforce motor vehicle emission standards." EPA concluded that the difference in language indicated that California must receive authorization from EPA before it can adopt any nonroad standards or requirements.

CARB took issue with EPA's interpretation of section 209(e)(2) as requiring California to obtain authorization before adopting regulations. It believed that for several reasons, EPA could and should follow the same process under section 209(e) as it follows in granting motor vehicle waivers under section 209(b). First, CARB argued that although section 209(e) states that "the Administrator shall . . . authorize California to adopt and enforce standards . . . ," sections 209(a) and (b) could be similarly construed when read together. Section 209(a) states that "no state . . . shall adopt or attempt to enforce. . . ." The only exception to the prohibition is if the Administrator grants a waiver under section 209(b). Thus, considered together, sections 209(a) and (b) could

[32] *See* 59 FR 31306, June 17, 1994, specifically 40 CFR Part 89, Subpart B, § 89.110–96.

be construed to preclude prior adoption of a regulation by a state unless a waiver is granted.

CARB noted that despite this language, EPA has consistently interpreted sections 209(a) and (b) to provide that the waiver process commences after state regulatory adoption. EPA's rationale has been that the Administrator should consider a "final" regulation when making a determination to waive federal preemption of state regulations that may differ from federal regulations. Between the time CARB holds a hearing on a proposed regulation and submission of the final regulation to the California Office of Administrative Law (OAL), significant changes could be made to the regulation. Under the California procedures for adopting regulations, CARB releases a "Staff Proposal: Initial Statement of Reasons for Proposed Rulemaking" along with a Notice for Public Comment. The comment period is forty-five days. A Board hearing takes place at the end of this forty-five day period. CARB makes modifications to the regulation after the hearing. These modifications are made available for public comment for fifteen days. CARB then prepares a "Final Statement of Reasons for Rulemaking" in which it addresses changes made to the regulation and summarizes and responds to all comments received during the public comment period. This document is submitted to the Executive Officer, who signs an Executive Order which formally adopts the final version of the regulations. Then CARB is required to submit the final regulation to OAL, which reviews regulations adopted by state agencies. OAL has thirty days to review and either approve or disapprove. It has authority to disapprove if (1) the regulation is inconsistent with California law or (2) improper procedure has been followed. If OAL disapproves, CARB has 120 days to modify the regulation, re-adopt, and re-submit the regulation to OAL.[33]

Thus, significant changes could be made to a regulation between the CARB hearing and adoption as well as after CARB adoption due to the review by OAL. If significant changes were to occur, the waiver California received would be insufficient to cover the regulations as adopted and California would be forced to reapply for a waiver of a now final regulation.

EPA finds California's argument persuasive. As an initial matter, the Agency no longer believes that the difference in language between sections 209(b) and (e) was intended to delineate a difference in the sequence of events surrounding adoption and authorization. The use of the past tense in section 209(b) ("has adopted") was merely intended to identify the states that could obtain a waiver for motor vehicle standards. (In fact, California alone had adopted such standards prior to March 30, 1966, and therefore, all other states have been prohibited from adopting emission control standards for new motor vehicles except as provided under section 177.) EPA also acknowledges that sections 209(a) and (b) could be read to require California to obtain a waiver prior to adopting motor vehicle standards, but the Agency has not so interpreted these provisions. Therefore, sections 209(b) and (e) need not be interpreted as requiring different adoption and authorization processes.

Moreover, EPA believes section 209(e) should be interpreted to allow a process like that established under section 209(b) for the same reasons EPA construed 209(b) to permit California to seek a waiver after it has adopted motor vehicle standards. It is inefficient for EPA to rule on a waiver or authorization request for what amounts to a regulatory recommendation. Until California adopts its program, neither California nor EPA can be sure that the program for which a waiver or authorization is requested is the program that the responsible official will sign into law. If there is a difference between the program submitted to EPA by California and the program California eventually adopts, any waiver or authorization granted may be insufficient to cover the enacted program.

In fact, EPA received comments that illustrate the confusion that would result if California were required to receive EPA authorization before it could adopt final regulations. Several commenters were concerned that CARB had modified its proposed Utility Engine Rule twice since CARB had requested EPA authorization in December 1990. The commenters requested that EPA clarify that it will grant authorization based on the most recent version it has received from CARB and that if any changes are made after an authorization is granted, California must resubmit its authorization request. EPA believes that today's change allowing California to adopt before receiving EPA authorization resolves this confusion and inefficiency.[34]

At the same time, EPA does not believe that section 209(e) may be interpreted to permit California to enforce any nonroad regulations before receiving authorization. Were California to enforce its regulations before it receives authorization, it would defeat the protection section 209(e) was established to provide—that California's nonroad program only go forward if EPA authorizes it in accordance with the provisions of that section. Thus, EPA believes that while California may adopt nonroad regulations before receiving EPA authorization, its adoption must be conditioned upon EPA's authorizing those regulations under 209(e). In short, California may adopt, but not enforce, nonroad standards prior to EPA authorization.

Regarding the authorization criteria, EPA proposed that the first two criteria be interpreted the same as for section 209(b). These criteria are first, that no waiver or authorization shall be granted if EPA finds that California's determination that its standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards is arbitrary and capricious. Second, no waiver or authorization shall be granted if California does not need such standards to meet compelling and extraordinary conditions.

The language of the third criterion, however, was not as clearly similar to section 209(b). Section 209(e)(2)(A)(iii) stated that no authorization shall be granted if "California standards and accompanying enforcement procedures are not consistent with this section." EPA proposed that "this section" be interpreted to mean consistent with sections 209(a) and 209(e)(1).

Commenters disagreed with EPA's proposed interpretation of "consistent with this section," stating that "consistent with section 209" should mean all of section 209, particularly section 209(b). Some commenters also proposed that "consistent with this section" should include section 213.

EPA has determined that, given the plain language of section 209(e), interpreting "consistent with this section" to mean "consistent with section 213" is not a reasonable statutory interpretation. The phrase "consistent with this section" clearly refers to section 209, not section 213. EMA proposed to interpret this phrase to refer to section 222 of the Clean Air Act Amendments of 1990. This would require consistency with both sections 209 and 213 of the Act. Absent any legislative history to explain the intent of "consistent with this section", however, this interpretation would give

[33] Cal. Admin. Code tit. 2, §§ 11340–11356 (1989).

[34] EPA notes, however, that as with motor vehicle waivers under section 209(b), if CARB substantively amends a rule, EPA would expect CARB to request a new authorization.

to the phrase a meaning clearly different than its plain meaning in light of its placement in section 209 alone.

The Agency has decided, however, that it is reasonable and effects Congressional intent to interpret "consistent with this section" to include all of section 209, including section 209(b)(1)(C). Hence, EPA believes that it should review nonroad authorization requests under the same "consistency" criterion that it reviews motor vehicle waiver requests.

Under section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California standards and accompanying enforcement procedures are not consistent with section 202(a) of the Act. EPA has interpreted this criterion in previous motor vehicle waiver decisions. First, California's standards are not consistent with section 202(a) if there is inadequate lead time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time frame. Second, California's accompanying enforcement procedures would be inconsistent with section 202(a) if the federal and California test procedures were inconsistent, that is, manufacturers would be unable to meet both the state and the federal test requirements with one test vehicle or engine.

EPA's review of nonroad authorization requests will include the following. First, CARB must request EPA authorization of its adopted nonroad standards. Second, EPA shall not grant an authorization if (1) EPA determines that CARB's "in the aggregate" determination is arbitrary and capricious; (2) California does not need such standards to meet compelling and extraordinary conditions; and (3) if California's nonroad standards are not consistent with section 209, *i.e.*, that they not be inconsistent with section 209(a), section 209(e), and section 209(b), as EPA has interpreted that subsection in the context of motor vehicle waivers.

J. State Adoption of California Standards and Test Procedures

EPA received comments on several aspects regarding how other states may adopt California nonroad standards and test procedures. First, both EMA and EMI argued that other states that decide to adopt California standards should be subject to the same process as California. However, the Act neither requires that states obtain EPA authorization to impose California's nonroad engine standards nor authorizes the Agency to require that states do so. Under section 209(e)(2)(B), any state which has plan provisions approved under part D of Title I of the Act (generally states within ozone nonattainment areas) may adopt and enforce, "after notice to the Administrator," California standards. Language requiring that other states request and receive authorization from EPA is noticeably absent. Indeed, the statutory text reads as *authorizing states* to adopt California standards on their own volition. In contrast, section 209(e)(2)(A) clearly states that California must receive authorization from EPA. Moreover, the language of section 209(e)(2)(B) is nearly identical to section 177 which provides that "any state which has plan provisions approved under this part may adopt and enforce" California motor vehicle emission standards. Under section 177 New York, Massachusetts and Maine have adopted California standards, and other states are considering following suit. These States did not ask for EPA authorization before they adopted the California standards, nor did EPA or the automobile industry suggest that they needed such authorization.[35]

Several commenters stated that section 209(e)(2)(B) required that California be subject to a two-year lead time requirement. EPA does not agree with this interpretation. Section 209(e)(2)(A) requires EPA to authorize California regulation of nonroad engines unless the Administrator makes certain findings, including that California's standards are "not consistent with this section." As discussed earlier, EPA interprets that phrase as requiring that California's standards are technologically feasible in the available lead time. Since California is thus required to provide adequate lead time under section 209(e)(2)(A), it would not make sense to interpret section 209(e)(2)(B) as independently requiring at least two years of lead time. Instead, EPA interprets section 209(e)(2)(B)'s reference to two years of lead time in the same way it interprets the virtually identical provision in section 177: that an adopting state must provide two years of lead time before the California standards take effect in the adopting state and California must have adopted standards two years before commencement of the period for which the standards take effect in the adopting state, but California may adopt standards having less than two years of lead time in California.

[35] Ford Motor Co. v. EPA, 606 F.2d 1293, 1298 (D.C. Cir. 1979).

K. Rulemaking Procedure

In the NPRM, EPA proposed definitions for the new engines used in the preempted categories: farm equipment, construction equipment, and locomotives. For equipment types that are used in a variety of applications, EPA also proposed a primary use test to assess whether such equipment is primarily used as farm or construction equipment. New engines used primarily in this equipment would be preempted from state regulation. EPA proposed that in determining "primary use", CARB would use sales data to show that an equipment type was or was not primarily used in farming or construction. When CARB requested EPA to authorize its proposed regulations, EPA would review California's determination regarding the primary use of particular equipment.

In the Proposed Authorization Decision, 53 FR 45876, September 6, 1991, EPA proposed to review the decision California made regarding the primary use of nonroad equipment under an arbitrary and capricious standard of review, the standard of review that section 209(e)(2) requires that the Administrator use in reviewing California's determination that its standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."

Several commenters, including EMA, EMI, PPEMA, and the Railway Engineering-Maintenance Suppliers Association, Inc. (REMSA) stated that EPA's proposed approach to determining the primary use of nonroad engines and equipment inappropriately relinquished authority to California. They pointed out that the primary use determination goes to the scope of the federal preemption accorded by section 209(e)(1), and argued that such a threshold determination should be made by EPA, not California. To the extent that California did have a role in determining primary use, they urged that EPA apply a clear and compelling evidence standard of review instead of the less strict arbitrary and capricious test in reviewing California's determinations.

EPA believes these commenters are essentially correct in that the scope of federal preemption is not for California to decide and that EPA should have a greater role in making that determination than the Agency's proposal would have required. At the same time, EPA sees nothing wrong with having California make a preliminary determination as to the use of nonroad engines and equipment.

California's coming forward with the evidence and analysis to support such a determination is in keeping with the role California has with regard to other aspects of the waiver and authorization requests it makes under section 209.

Notably, sections 209(b) and (e) expressly place the burden of coming forward on California only with regard to the determination of the aggregate protectiveness of California's program. Nevertheless, under section 209(b) California has traditionally addressed not only the protectiveness determination but also the other two criteria set forth in section 209(b)(1)(B) and (C). This approach simply reflects the fact that California is the party interested in obtaining the waiver. Similarly, under section 209(e) EPA believes it appropriate for California to make a preliminary use determination (primary use, as discussed above) based on the available evidence and for EPA to review that determination in light of any public comments and additional evidence received.

EPA agrees with the industry commenters that the arbitrary and capricious standard of review is not appropriate for review of California's primary use determination. The arbitrary and capricious standard is generally applied in two types of circumstances: (1) where the decision-maker must apply his expertise to resolve complex issues, or (2) where the decision-maker has been accorded discretion in making the decision under review. Underlying the arbitrary and capricious standard is a recognition that the reviewing authority either does not have as much expertise as the decision-maker or that the judgment of the reviewing authority should not be substituted for that of the decision-maker to whom discretion has been granted. An illustration of this approach to application of the arbitrary and capricious standard of review is Congress' specification of that standard for California's protectiveness determination under section 209. The legislative history of that section makes clear that Congress sought to give California broad leeway to design a program that in California's judgment was best suited to the unique set of circumstances faced by that state.

Neither reason for applying the arbitrary and capricious standard of review applies to California's primary use determinations. California does not have unique expertise in determining the use of nonroad engines and equipment. Nor is there any indication that Congress sought to accord California discretion to determine the scope of federal preemption. Indeed the fact that Congress prohibited *all* state regulation of certain categories of new nonroad equipment and required California to obtain EPA authorization to regulate any other categories suggests a strong congressional interest in limiting state regulation affecting makers of new nonroad engines and equipment. While preemption provisions are generally construed narrowly, congressional intent to prohibit states from regulating in certain areas must also be safeguarded. EPA believes the arbitrary and capricious standard of review would not sufficiently reflect congressional intent to prohibit state regulation of farm and construction equipment.

At the same time, EPA does not believe that the much stricter clear and compelling evidence standard suggested by CIAQC is the appropriate standard of review. CIAQC argued that in *Motor and Equipment Manufacturers Association, Inc.*, 627 F.2d 1095, (D.C. Cir. 1979) (*MEMA I*), the court found that the Administrator's use of a clear and compelling evidence standard to evaluate California's request for a waiver for enforcement procedures was valid. EPA disagrees with CIAQC's application of *MEMA I*.

As an initial matter, *MEMA I* does not deal with the threshold matter of the scope of preemption. On such matters the court is silent as to the appropriate standard of review beyond providing general guiding principles. Instead, the court focuses on the standard of review to be employed by EPA on California's protectiveness determination. In fact, the section of the decision cited by CIAQC focuses on this issue, not on the issue of preemption. There the court not only states that California's determination is presumed to satisfy the waiver requirements, but that the burden of proving otherwise falls on the party attacking the determination. It is in this context that the court notes that the Administrator determined that there must be "clear and compelling evidence" to show that California's proposed procedures *undermine* the protectiveness of California's standards. It is in the context of a party challenging California's protectiveness determination that the clear and compelling standard comes into play. Thus, EPA believes that the clear and compelling standard is neither applicable nor appropriate for its review of CARB's primary use determination.

The Agency considers the preponderance of the evidence standard of review to be appropriate for its review of California's primary use determination. If EPA were to make the determination itself, it would apply such a test in making it. There is no reason to apply a different test simply because California has made an initial determination. Public commenters may supplement the record assembled by California in support of its determination, and the Agency will weigh all the evidence in reviewing California's determination. To the extent California's determination is supported by a preponderance of the evidence in the record, EPA will accept it.

Several commenters stated that EPA was denying interested parties their due process rights by attempting to consider California's request for authorization for its Utility Engine Rule at the same time it is seeking comment on its proposed criteria for authorizing nonroad requests. The commenters argued that a final rule under section 209(e) was necessary to comment meaningfully on the CARB authorization request.

EPA believes parties should be given another opportunity to comment on California's utility engine rule after today's rule implementing section 209(e) has become final. Thus, EPA will publish in the **Federal Register** a Notice of Opportunity for Public Hearing and Request for Comments regarding California's request for authorization of its Utility Engine Rule. Interested parties will have the opportunity to submit written comments, and if requested, EPA will hold a hearing. This will provide interested parties with an opportunity to comment on California's request after today's rule is finalized.

L. Executive Order 12866

In the NPRM, EPA stated it had determined that the proposed rule is not "major" within the criteria set forth in section 1(b) of Executive Order (E.O.) 12291 and was therefore not required to prepare a Regulatory Impact Analysis (RIA). Since the NPRM E.O. 12291 has been replaced by Executive Order 12866.

Under Executive Order 12866, (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations or recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Comments were received from EMI which suggested that an RIA be performed under the guidelines set forth in E.O. 12291. EPA will examine these comments in the context of E.O. 12866. In connection with every "significant regulatory action" as defined at section 3(f)(1) (Annual effect on the economy of $100 million * * *), E.O. 12866 requires an RIA be performed. EMI submitted that the second and third independent criteria for a "major rule" under E.O. 12291, were met by both the NPRM and CARB's Utility Engine Rule currently before EPA.

In relation to the second criterion for determining whether a rule is "major", EMI stated that its member manufacturers of farm and construction equipment will incur costs in attempting to comply with EPA's rule and CARB's Utility Engine Rule. EMI also states that both consumers of farm and construction equipment and California's economy will incur costs as a result of geographically diverse emission standards. EMI makes reference to no evidence or cost data in support of its claim.

EMI points to the potential of diverse or multiple emission standards as its support that United States farm and construction equipment manufacturers would be unduly hindered in the international marketplace as evidence that the rule meets the third criterion for a "major rule". Again, EMI makes no reference to any examples of costs or evidence to support its belief.

EPA still believes that an RIA is not needed for the NPRM or the final rule. Today's rule does not itself impose any increase in costs to individual industries or the State of California. Indeed, the rule merely sets out definitions and criteria for nonroad authorization requests. California makes cost determinations as part of its own rulemaking and provides the rulemaking record to EPA as part of an authorization request. At the same time, EPA notes that while its rule does not impose any direct costs on equipment manufacturers, the more narrowly the scope of preemption is drawn, the more opportunities California has to impose costs through regulations.

Pursuant to the terms of E.O. 12866, OMB notified EPA that it considered the action a "significant regulatory action" within the meaning of the Executive Order. EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

M. Paperwork Reduction Act

In the NPRM, EPA stated that the proposed rule did not contain any additional information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* (PRA). The purpose of the PRA is "to minimize and control burdens associated with the collection of information by federal agencies from individuals, businesses and other private institutions, and State and local governments." 5 CFR 1320.1.

EPA received comments from two parties claiming that the PRA applied to the proposed rule and that such application would require changes within the proposed rule. North American Equipment Dealers Association (NAEDA) and EMI indicated that the "primary use" test would cause an increase of burdensome paperwork, with manufacturers dependent upon dealers and end users to provide the requisite information to determine primary use. At the same time, EMI noted that EPA did not specify any particular paperwork requirements. In addition, EMI did not indicate that any information need be submitted to EPA. Instead, EMI apparently supposes that under the PRA a greater administrative burden would be created by implementing a primary use information collection system as opposed to a "designed for" test and information collection system, and thus claims the latter should be implemented.

EPA finds these comments are not relevant to the question of whether the Paperwork Reduction Act applies to the proposed and final rule. Although EPA finds the comments helpful in understanding the distinction between the "primary use" versus "designed for" issue, the comments fail to set forth any basis for asserting that the final rule, which adopts the proposed primary use test, contains any additional information collection requirements. Indeed, the comments presuppose the applicability of the PRA and focus on options to make information collection less burdensome without recognizing the significance of the fact that EPA has not required any information collection from manufacturers, dealers, or any private entity. EPA did not propose and has not included in the final rule any paperwork requirements and thus imposes no burden upon manufacturers, dealers or end users of nonroad equipment to submit to EPA any information regarding the use of nonroad equipment. EPA recognizes that in order for California to receive authorization from EPA for non-preempted nonroad equipment, California must present sufficient information that nonroad equipment is not used more than 51 percent as farm or construction equipment. California may thus require submission of relevant information to determine primary use, but EPA has not.

EPA has determined that the Paperwork Reduction Act does not apply towards this rulemaking. EPA has not set forth any specific requirements for these entities to collect or submit any data to EPA.

N. Regulatory Flexibility Act

In the NPRM, EPA stated that the proposed regulation would not have a significant impact on a substantial number of small entities. EPA determined that the proposed rule would affect manufacturers of nonroad equipment, a group without a substantial number of small entities.

EPA received public comments which suggested that the proposed rule would in fact affect small entities. One small business equipment dealer commented that if the proposed rule and CARB's Utility Engine Rule are enacted, and nonroad farm and construction equipment is separately regulated by California, then it would be adversely impacted. This same dealer, along with the Far West Equipment Dealers Association (FWEDA), stated that a scenario would arise where new and used nonroad farm and construction equipment purchased outside California would cost less than that found in California, and would thus adversely affect dealers of such equipment within California. FWEDA provided examples of several pieces of farm or construction equipment, and their projected cost increases in order to meet proposed CARB emission standards, in an effort to present the price differential for California dealers of such equipment. In addition, FWEDA states that the purchasers/users of their farm and construction equipment within California will be at an unfair cost disadvantage in relation to users outside of California's boundary.

For purposes of Regulatory Flexibility Act analysis, the issue is whether the final rule will have a significant impact on a substantial number of small entities. EPA makes no change in its

determination in the NPRM that the final rule will have no significant impact on a substantial number of small entities since the rule imposes no burden on *any* entities. However, EPA reminds the parties which submitted comments on the applicability of the Regulatory Flexibility Act that California is specifically preempted from regulation of farm and construction equipment under 175 horsepower. The pieces of equipment cited by FWEDA as being potentially affected are preempted from regulation by California. Thus, the apprehension that such equipment will cost less outside of California is unfounded, as such equipment will be subject only to the federal regulations.

As a result, EPA has determined, as required under the Regulatory Flexibility Act, that the final rule does not have a significant impact on a substantial number of small entities.

List of Subjects for 40 CFR Part 85

Environmental protection, Administrative practice and procedure, Air pollution control, Federal preemption, Motor vehicle pollution, Nonroad engine and vehicle pollution, Reporting and recordkeeping requirements, and State controls.

Dated: July 1, 1994.

Carol Browner,

Administrator.

Therefore, 40 CFR Part 85 is amended as follows:

PART 85—CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES AND MOTOR VEHICLE ENGINES

1. The authority citation for part 85 is revised to read as follows:

Authority: 42 U.S.C. 7521, 7522, 7524, 7525, 7541, 7542, 7543, 7547, and 7601(a), unless otherwise noted.

2. Part 85 is amended by adding subpart Q to read as follows:

Subpart Q—Preemption of State Standards and Waiver Procedures for Nonroad Engines and Nonroad Vehicles

Subpart Q—Preemption of State Standards and Waiver Procedures for Nonroad Engines and Nonroad Vehicles

§ 85.1601 Applicability.

The requirements of this subpart are applicable to nonroad engines and nonroad vehicles.

§ 85.1602 Definitions.

As used in this subpart, all terms not defined shall have the meaning given them in the Clean Air Act, as amended.

Commercial means an activity engaged in as a vocation.

Construction equipment or vehicle means any internal combustion engine-powered machine primarily used in construction and located on commercial construction sites.

Engine used in a locomotive means either an engine placed in the locomotive to move other equipment, freight, or passenger traffic, or an engine mounted on the locomotive to provide auxiliary power.

Farm equipment or vehicle means any internal combustion engine-powered machine primarily used in the commercial production and/or commercial harvesting of food, fiber, wood, or commercial organic products or for the processing of such products for further use on the farm.

Locomotive means a self-propelled piece of on-track equipment (other than equipment designed for operation both on highways and rails, specialized maintenance equipment, and other similar equipment) designed for moving other equipment, freight, or passenger traffic.

New means a domestic or imported nonroad vehicle or nonroad engine the equitable or legal title to which has never been transferred to an ultimate purchaser. Where the equitable or legal title to an engine or vehicle is not transferred to an ultimate purchaser until after the engine or vehicle is placed into service, then the engine or vehicle will no longer be new after it is placed into service. A nonroad engine or vehicle is placed into service when it is used for its functional purposes. The term *ultimate purchaser* means, with respect to any new nonroad vehicle or new nonroad engine, the first person who in good faith purchases such *new* nonroad vehicle or new nonroad engine for purposes other than resale. This definition of *new* shall not apply to locomotives or engines used in locomotives.

Nonroad engine means:

(1) Except as discussed in paragraph (2) of this definition, a nonroad engine is any internal combustion engine:

(i) In or on a piece of equipment that is self-propelled or serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers); or

(ii) In or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); or

(iii) That, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

(2) An internal combustion engine is not a nonroad engine if:

(i) The engine is used to propel a motor vehicle or a vehicle used solely for competition, or is subject to standards promulgated under section 202 of the Act; or

(ii) The engine is regulated by a federal New Source Performance Standard promulgated under section 111 of the Act; or

(iii) The engine otherwise included in paragraph (1)(iii) of this definition remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility, or installation. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. A seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least two years) and that operates at that single location approximately three (or more) each year. This paragraph does not apply to an engine after the engine is removed from the location.

Primarily used means used 51 percent or more.

§ 85.1603 Application of definitions; scope of preemption.

(a) For equipment that is used in applications in addition to farming or construction activities, if the equipment is primarily used as farm and/or construction equipment or vehicles, as defined in this subpart, it is considered farm or construction equipment or vehicles.

(b) States are preempted from adopting or enforcing standards or other

requirements relating to the control of emissions from new engines smaller than 175 horsepower, that are primarily used in farm or construction equipment or vehicles, as defined in this subpart.

(c) States are preempted from adopting or enforcing standards or other requirements relating to the control of emissions from new locomotives or new engines used in locomotives.

(d) No state shall enforce any standards or other requirements relating to the control of emission from new nonroad engines or vehicles except as provided for in this subpart.

§ 85.1604 Procedures for California nonroad authorization requests.

(a) California shall request authorization to enforce its adopted standards and other requirements relating to the control of emissions from new nonroad vehicles or engines that are otherwise not preempted by § 85.1603(b) or 85.1603(c) from the Administrator of EPA and provide the record on which the state rulemaking was based.

(b) After receipt of the authorization request, the Administrator shall provide notice and opportunity for a public hearing regarding such requests.

§ 85.1605 Criteria for granting authorization.

(a) The Administrator shall grant the authorization if California determines that California standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards.

(b) The authorization shall not be granted if the Administrator finds that:

(1) The determination of California is arbitrary and capricious;

(2) California does not need such California standards to meet compelling and extraordinary conditions; or

(3) California standards and accompanying enforcement procedures are not consistent with section 209.

§ 85.1606 Adoption of California standards by other states.

Any state other than California which has plan provisions approved under Part D of Title I of the Clean Air Act may adopt and enforce emission standards, for any period, for new nonroad vehicles or engines subject to the following requirements:

(a) The state must provide notice to the Administrator that it has adopted such standards.

(b) Such standards shall not apply to new engines which are used in construction equipment or vehicles or used in farm equipment or vehicles and which are smaller than 175 horsepower or to new locomotives or new engines used in locomotives.

(c) Such standards and implementation and enforcement shall be identical, for the period concerned, to the California standards authorized by the Administrator.

(d) The state shall adopt such standards at least two years before commencement of the period for which the standards take effect.

(e) California shall have adopted such standards two years before commencement of the period for which the standards take effect in the state that is adopting under section 209(e)(2)(B).

[FR Doc. 94–17002 Filed 7–19–94; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 93–230; RM–8298, RM–8359]

Radio Broadcasting Services; Madison, South Dakota and Slayton, Minnesota

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In response to a petition filed by Wallace Christensen a *Notice of Proposed Rule Making* was issued requesting the substitution of Channel 276C2 for Channel 276A at Slayton, Minnesota, modification of the construction permit for Station KLOH–FM accordingly, substitution of Channel 288A for Channel 276A at Madison, South Dakota, and modification of the license for Station KJAM–FM to accommodate the upgrade at Slayton. *See* 58 FR 42714, August 11, 1993. In response to a counterproposal filed by Madison Broadcasting Company, we will substitute Channel 291C2 for Channel 276A at Slayton, Minnesota, at coordinates 43–59–43 North Latitude and 95–44–51 West Longitude and modify the construction permit for Station KLOH–FM accordingly. We shall also substitute Channel 276C2 for Channel 276A at Madison, South Dakota, at coordinates 43–59–08 North Latitude and 97–07–42 West Longitude and modify the license for Station KJAM–FM to specify operation on the higher class channel. With this action, this proceeding is terminated.

EFFECTIVE DATE: August 29, 1994.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, MM Docket No. 93–230, adopted June 30, 1994, and released July 15, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, (202) 857–3800.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

47 CFR PART 73—[AMENDED]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Minnesota, is amended by removing Channel 276A and adding Channel 291C2 at Slayton.

3. Section 73.202(b), the Table of FM Allotments under South Dakota, is amended by removing Channel 276A and adding Channel 276C2 at Madison.

Federal Communications Commission.

John A. Karousos,

Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 94–17607 Filed 7–19–94; 8:45 am]
BILLING CODE 6712–01–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 1

[OST Docket No. 1; Amdt. 1–263]

Organization and Delegation of Powers and Duties; Delegation of Authority to the Maritime Administrator

AGENCY: Office of the Secretary, DOT

ACTION: Final rule.

SUMMARY: The Secretary of Transportation (Secretary) hereby delegates to the Maritime Administrator authority conferred by Section 2927, Title XXIX, of Public Law 103–160, enacted November 30, 1993, to convey surplus real property to public entities for use in the development or operation of a port facility. The Secretary also